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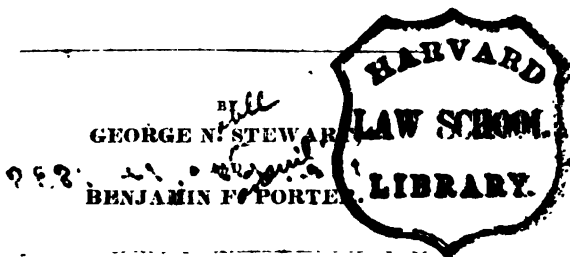
OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA.



VOL. I.

(Containing the Decisions of part of January Term, 1831—of July Term, 1831—and of part of January Term, 1832.)

TUSKALOOSA.

PRINTED BY MARMADUKE J. SLADE.

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• 1836.

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*Rec. Dec. 14, 1838*

THE present Volume of Reports, with the title of "*First Stewart and Porter*," is the commencement of a series of Decisions of the Supreme Court, unpublished at the time of the resignation of the former Reporter, GEORGE N. STEWART, Esquire. Under an arrangement with that gentleman, the undersigned has assumed the responsibility of preparing them; and for convenient reference, has thought proper to give the Volumes their present title.

Those which are intended to be published, under this name, commence with the close of "Third Stewart," and will terminate with the Decisions of January Term, 1834.

B. F. PORTER.

TUSKALOOSA, September, 1836.



## **JUDGES OF THE SUPREME COURT,**

**During the time of these Decisions, from the commencement of this Volume,  
until the 14th January, 1832.**

**Hon. ABNER S. LIPSCOMB, Chief Justice.**

<b>" REUBEN SAFFOLD,</b>	<b>} Associate Justices.</b>
<b>" ANDERSON CRENSHAW,</b>	
<b>" JOHN M. TAYLOR,</b>	
<b>" JOHN WHITE,</b>	
<b>" SION L. PERRY,</b>	
<b>" HENRY W. COLLIER,</b>	

---

**CONSTANTINE PERKINS, Esq. Attorney General.**

**HENRY MINOR, Esq. Clerk.**





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# REPORTS

OF

## THE DECISIONS

OF

### THE SUPREME COURT OF ALABAMA,

JANUARY TERM, 1831.

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#### DEWOODY *versus* HUBBARD.

A deed of trust of personal estate, regularly executed and recorded, for the benefit of a creditor, will not be deemed invalid, merely for the want of the signature of the trustee.

This was an action, under the statute, to try the right of property to certain slaves, which had been levied on, at the suit of the defendant in error, as of the estate of one Campbell. On a trial had in the Circuit Court of Lawrence, the plaintiff in error produced a deed of trust, in evidence, which had been executed to himself, as trustee, by Campbell, to secure debts due to one Dickson.

The Court instructed the jury, that the deed, not having been signed by the trustee, was void, and passed no title in the property conveyed: on which charge, a verdict was rendered, subjecting the property to Hubbard's execution. Dewoody having excepted, brought the case here for revision.

**MAYOR AND ALDERMEN OF MOBILE vs. RICHARDSON, et al.**

Where the mayor and aldermen of a corporation, appropriated a certain amount to the holders of real estate, as damages, for injury done to such estate, in widening a street, held

First. That the consent of the holders of the real estate to receive the amount appropriated, vested sufficient consideration, to support an action for the recovery of the amount.

Second. That the resolution of the corporation was an admission of the right of the parties in the land appropriated.

This action was debt, brought by the defendants in error, in the Circuit Court of Mobile, to recover an amount of money, appropriated by the Mayor and Aldermen of that city to the defendants, as damages for injury done to their real estate, in widening a street.

A judgment was had in favor of the plaintiffs below, and on a bill of exceptions, the case was brought into this Court : where the questions raised, were, as to the sufficiency of the consideration between the parties ; and of the right of the plaintiffs in error to question the interest of the defendants, in the real estate.

*Gordon, for Plaintiffs—Hall, contra.*

COLLIER, J.—The defendants in error brought this action in the Circuit Court of Mobile against the plaintiffs in error. On the trial, the defendants offered, and read to the jury, without objection, the following documentary proof. "At an adjourned meeting of "the Board of Mayor and Aldermen, convened the "5th day of June, 1827. Present, John F. Everett, "Mayor ; Aldermen William R. Hallett, Richard G.

“Ryder Jesse Jayne, Philip McLoskey, Curtis  
“Lewis.”

“The committee to whom was referred the subject of the claim for damages to land on Jackson street, between Government and Church street, by Thomas Richardson, junior, in consequence of altering said street in pursuance of the new survey of the city, respectfully report—that on a full examination of the subject, they are of opinion that the jury, who assessed the damages could not have had a correct view of the case before them, and that the damage sustained, is far greater than was assessed ; they are therefore, of opinion, that the proposition of Mr. Richardson, for himself and John French, is reasonable and just, with the exception of the costs of Court in said case, (Thomas Richardson, jr. *vs.* The Corporation,) and would recommend the adoption of a resolution to that effect.

(Signed,)

CURTIS LEWIS, }  
R. G. RYDER, } Com'e.”  
JESSE JAYNE, }

“*Resolved*, That the report of the committee be concurred in, and that Thomas Richardson, jr. and John French have an order on the Treasurer for six hundred and sixty dollars seventy-five cents, in full of all claims.”

On this proof, the Court instructed the jury, in substance, that a corporation must, in general, act in pursuance of the provisions of its charter ; yet, although the jury might believe that the plaintiffs in error had not acted in pursuance of the provisions of the act of incorporation, still, if the land of the defendants in error had been appropriated by the plaintiffs for a public street, then ought the plaintiffs to pay for it, if they had made a promise to do so ; and fur-

ther that the resolve of the Board of Mayor and Aldermen, was to be considered as an admission of the defendants right to the land agreed to be paid for.

The assignment of error brings up for revision, the correctness of the instructions of the Court.

It is needless to consider the adaptation of the form of action to the proof. That point was not raised in the Court below, and is not now brought to the view of this Court. We therefore proceed to consider the sufficiency of the resolve of the Mayor and Aldermen to bind the corporation to the payment of the sum expressed in it. The consideration of this question necessarily brings into review, to some extent, the corporate powers of the plaintiff.

By the 15th section of an act passed on the 24th December, 1824, entitled, an act "to alter and amend the charter of incorporation of the city of Mobile," it is enacted, that that corporation shall have power to widen the streets, &c. within the city, provided, that no street, &c. then existing, shall be widened or extended, so as to infringe upon or interfere with any dwelling-house or other houses of any inhabitant of the city, without the consent of the owner or claimant thereof. *And provided further*, that in all cases where the location of any street, &c. may or shall, by the alteration of the same, prejudice the right or interest of any one, the clerk of the board, under the direction of the Mayor, &c. shall draw a jury of twelve freeholders to assess the damage, &c. This provision does not indicate with as much clearness as could be desired, the intention of the Legislature. It leaves it somewhat doubtful, whether it was designed to restrict the corporation in the acquisition of property for the purposes expressed in the act, to

the ascertainment of its value by a jury. The literal sense of the second *proviso*, favors the idea that such was the intention of the Legislature, while the first is entirely adverse to it. In this conflict of terms, in order to adjust the true meaning of the provision, we must look to the end contemplated by the grant of power it conveys, and enquire in what manner it can be most equitably exercised.

The improvement of the city, by adding to its health, comfort and beauty, and the facility of passage from one point to another was, doubtless, the inducement to the provision.

The right to appropriate private property for public purposes, against the consent of the owner, is one which appertains to every government, and has, *pro re nata*, been transferred to the plaintiffs. But it is a right which should be exercised only in cases of real necessity. The power of the law should never be called in aid to fix the value of private property, when its value can be ascertained by voluntary stipulation between the public and the individual. It is only when the owner is perverse, and will not dispose of it for an equivalent, that coercive measures should be resorted to; when he himself fixes the price of his property, he parts with it the more willingly, and can not complain that it has been wrested from him by an act of *sheer power*.

It can not be that the consent of the owner, contemplated by the first proviso, is to be understood as meaning only, a gratuitous appropriation of property. There is no incongruity in the idea of a consent obtained by *purchase*, (*in its limited sense*) and in the cases in which it could be otherwise acquired, must be of rare occurrence. The reason of the thing

then, in the absence of language strongly opposing, would authorise the inference, that it was competent for the plaintiffs to acquire a right to real property, under this provision, either by gift, or by a voluntary or forced sale.

Upon the assumption, that the value of the defendants' property has been assessed by a jury, it is argued for the plaintiffs, that it was incompetent for the board of Mayor and Aldermen to have set aside the assessment, and pass the resolution on which this action is founded. If the plaintiffs, without the consent of the defendants, had set aside the assessment, and such an argument had proceeded from the defendants, it would have been entitled to much consideration. The authorities to which we have been cited by the plaintiffs' counsel, upon this point, furnish cases in which the parties, in whose favor the assessments were made, were endeavoring to affirm them against the consent of the corporation, and hence, can not be received as authority to sustain the argument.\*

\*6 Johns.1.  
7 ib. 540.

The right to contract without the intervention of a jury, includes the right to disregard their finding, and proceed as if they had never been summoned: this is a proposition too clear for illustration.

The defendants then, having consented to receive the sum expressed in the resolution of the board of Mayor and Aldermen, as a compensation for their loss of property; the right of the corporation to widen the street, to the defendants prejudice vested, and such consent, constitutes a sufficient consideration to authorise a recovery.

The Court was certainly correct in supposing that the report of the committee, and the resolve of the



## PREWETT vs. MARSH.

corporation, was an admission of the defendants right to the land appropriated. If the admission was made under a wrong impression, the plaintiffs should have made it appear by proof.

We are of opinion that there is no error, and the judgment must be affirmed.

CRENSHAW, J. not sitting,

PREWETT, use of Johnson, *versus* MARSH.

A justice of the peace, who receives money in his official capacity, cannot lawfully retain it, in satisfaction of a debt due him individually.

The nominal plaintiff in a suit, (brought in the name of such plaintiff for the use of another,) can not be rejected as a witness for the defendant where it appears that he was evidently consenting to be made a witness.

This action was instituted in the name of Prewett, for the use of Johnson, in the County Court of Clarke; and was founded on a claim for money received by the defendant in his official capacity, as a magistrate. A judgment being rendered for the defendant below, the case, on a bill of exceptions, was brought here: and the questions of error arose on the opinion of the Court below. That Court decided,

1st. That Prewett, though the nominal plaintiff, could not be a witness in favor of the defendant, and

2d. That the defendant could not show a retention of the money collected by him, in discharge of his own private debt.

CRENSHAW, J.—This action was brought against the defendant, to recover money which he had collected in the capacity of a justice of the peace.

On the trial, "after the plaintiff had proved his case, the defendant offered to prove certain facts by Prewett, the nominal plaintiff; but who was rejected by the Court, on the ground, that as he was a party to the record, he could in no event be examined as a witness.

The defendant having offered testimony to prove that the money collected by him, was due to a certain Rosser, and that Rosser was indebted to him; requested the Court to instruct the jury, that the debt due from Rosser to the defendant, was a good offset to the plaintiff's action, which the Court declined; but instructed the jury, that an officer could not detain money by him received in his official capacity, to satisfy a debt due him in his private capacity. All of which is now assigned for error.

We are of opinion that the charge was correct, and that the instruction requested, was properly refused. We believe with the Judge of the County Court, that a Justice of the Peace who receives money in his official capacity, can not lawfully detain it in satisfaction of a debt due him in his private capacity; and that it can not be the subject of payment or offset, though the person who was indebted to the Justice was to receive the money by him so collected.

But on the first assignment of error, which was the rejecting of Prewett, the nominal plaintiff, when offered as a witness by the defendant, we are of opinion, that Prewett, being a party to the record, and interested in the event of the suit, at least so far as related to the cost, the defendant could not claim the

## SCOTT vs. RIVERS.

benefit of his testimony as a matter of right. But if Prewett was willing to testify on the part of the defendant, this was against his own interest, and the defendant would be entitled to the benefit of his evidence. In the bill of exceptions, it is not expressly stated that Prewett was willing to be sworn and examined as a witness, but it is stated "that Prewett coming to the book, and being ready to be sworn to give testimony," was rejected by the Court; and from which, the inference is plain, that he was willing to be sworn, and to give evidence. It was his privilege to claim the exemption, when called as a witness by the defendant: unless he objected, and insisted on his right, his willingness to testify, was a clear implication. For this error, the judgment is reversed, and the cause remanded.

## SCOTT versus RIVERS.

Where a party, to whom a deed has been executed, resides without the State, such circumstance will be sufficient, under the statute, to authorise a copy of the deed duly authenticated, to be received in evidence.

An offset, against a plaintiff's demand, in an action by him, to be available, and to authorise a balance in favor of defendant; must appear to be of matters mutually subsisting between the parties.

Assumpsit, in the County Court of Monroe, by Scott against Rivers, to recover the amount of a promissory note: The circumstances of the case appear fully in the opinion of the Court.

SAFFOLD, J.—The action was assumpsit on a promissory note, drawn by Rivers in favor of Scott, for

\$1000, the suit having been brought by the present plaintiff against the defendant, in the County Court of Monroe. The pleas were the general issue, payment and set-off. The material facts, as shewn by a bill of exceptions, taken on the trial, appear to have been, that in 1824, Thomas Scott, brother of the plaintiff, (both of whom being residents of North Carolina,) presented the note sued on, and two others of the same amount, and one of about \$500, between the same parties, to the defendant, in this State, claiming them as his own property, and required security for the payment thereof. Pursuant to an arrangement between them, the defendant executed a deed to T. Scott, for a house and lot in Cahawba, estimated by them at \$2000, which was to be applied in part payment of said notes, but there was a collateral verbal agreement, expressed between them at the time, that Scott should sell the house and lot within two years, if as much as \$2000 or more, could be had for them, and in that event, the overplus, if any, should be applied as a farther payment on said notes. Scott constituted Steel, (a witness in the case,) his attorney in fact, to make sale of the property, and apply the proceeds according to agreement; delivered all the notes to him, but retained the deed in his own possession. More than twelve months afterwards, Steel saw plaintiff and T. Scott in North Carolina, the former made no mention of either the notes or deed to him, but the latter conversed with him on the subject, and said he had assigned the deed to a Mr. Haywood. Steel, plaintiff, defendant, and T. Scott, are related to each other. It also appeared the defendant had rented the house after the execution of the conveyance.

The defendant's counsel offered in evidence a duly authenticated copy of the deed, to ascertain the time at which the \$2000 had been paid: on objection being made to which, the Court permitted it to go as evidence to the jury; and instructed them it was admitted for the sole purpose of enabling them, should they allow the set-off, to ascertain from it up to what time to calculate interest.

On this state of facts the Court further instructed the jury, that if they believed T. Scott was the agent of the plaintiff; or that the note sued on was his property, they must allow the defendant the \$2000 agreed to be paid for the house and lot; and that possession of the note by T. Scott, was evidence sufficient for the jury to infer that he was either the owner of the notes, or agent of the plaintiff, unless there was evidence from which they could infer that the notes were fraudulently, or improperly obtained from the plaintiff. Other exceptions were taken to the opinion of the Court below, but which will be sufficiently embraced by the remarks to be made on these already stated. The jury found for the defendant, and certified a balance in his favor of \$960.

In the above opinions and instructions to the jury, the Court is charged to have erred.

The questions arising are, 1st. Was the copy of the deed admissible as evidence for the purpose for which it was received, or otherwise. 2d. Were the instructions to the jury correct, that the unexplained possession of the notes by T. Scott, was evidence sufficient for them to infer either that he was owner of the notes, or agent of the plaintiff; and, that if he were either, the jury might allow the defendant the \$2000, agreed to be paid for the house and lot.

With respect to the deed, it is sufficient to observe, that as T. Scott was the grantee, as he received the deed, then resided in Carolina, and must be presumed to have remained beyond the jurisdiction of the Court in which the trial was had, this is believed to be a case within the spirit and intent of the statute. "that if the original deed or conveyance, be lost or mislaid, or be destroyed by time or accident, and not in the parties power to produce," then a duly certified copy shall be received as evidence in lieu of the original. Hence it is conceived that there was no error in admitting the copy as evidence, either for the specific purpose, or any other legitimate object.

But on the second point there appears to be more difficulty. Admitting that the possession of the notes by T. Scott, accompanied, by his claim of ownership, was *prima facie* evidence of the fact, this was a legal presumption rebutting the idea of his being the agent of C. W. Scott, the plaintiff, and payee of the notes; consequently it was not a circumstance from which the jury were authorised to infer that he was either the one or the other, but that he was the owner merely. Then if the contract between the defendant and T. Scott, was made by the latter in his own right; and thereby he became indebted to the former, or made payment on the notes to him, to the amount of two thousand dollars, or other sum, the balance, after satisfying the note sued on, could not be treated as a debt or set-off against C. W. Scott, the plaintiff, who must be regarded as a distinct person.

Whether, according to the terms, and true intent, of the contract respecting the house and lot, the sum of two thousand dollars had not been paid on the several notes; and whether the defendant would not

have been entitled to a discount to the same amount, in any future suit or suits, that were or could have been brought against him on the same notes, by either T. Scott, C. W. Scott the payee, or any subsequent holder, or assignee, are questions essentially different from the ~~one~~ presented. If such was the spirit of the contract with T. Scott, when he was the legal holder of the notes, though they were drawn payable to C. W. Scott, or order, and had not been endorsed, we think the defendant would have been entitled to the benefit of such defence as payment; and if separate suits were brought on the notes, by making this proof to the satisfaction of the jury, he ought to have been allowed to defeat the recovery in one, and to reduce the amount on another, as far as the balance of the payment would go. But, in the instruction that the defendant in a suit by C. W. Scott, on a note for one thousand dollars, could be allowed the benefit of the payment to the other Scott, to a much larger amount; which could only be done by finding a balance against the plaintiff, as in case of set-off, the Court is believed to have erred. To authorise a set-off, and a balance against a plaintiff, the debts or demands must be mutual and subsisting between the same parties, which in this case could not have been inferred.

*Judgment reversed and remanded.*

SCOTT *versus* RIVERS.

Courts of law, in the exercise of legitimate and incidental powers, have authority to authorise the set-off, of one judgment, against another, existing between the same parties, in the same Court.

And such order is not subject to revision in error.

This case was submitted on a motion, to dismiss the writ of error; and involved the correctness of the determination of the County Court of Monroe, in relation to an order off-setting one judgment against another, which existed between the same parties, in the same Court. The questions decided appear in the opinion of the Court.

SAFFOLD, J.—The present plaintiff was plaintiff in the County Court, and as such, obtained judgment on a note against the defendant for one thousand four hundred and thirty eight dollars and fifty-three cents. At the same time, in another suit between the same parties, a trial was had, in which Rivers, the defendant, obtained a judgment, as in case of set-off, for the sum of nine hundred and sixty dollars, as a balance certified by the jury to be due him, over and above the sum demanded of the said Charles W. Scott. After which, and during the same term, a motion was made, at the instance of Rivers, the defendant, to have his said former judgment against the plaintiff, set-off and placed to the satisfaction of so much of the judgment standing against him. The Court sustained the motion, and ordered the set-off accordingly.

This order is the matter assigned for error.



By means of the adjudication in the former case, we know that the judgment rendered for the balance in favor of the defendant, Rivers, was considered erroneous, and that the same has been reversed during the present term. This information, however, acquired in a different suit, can have no influence in the decision of this case. The different suits and records being separate and distinct, we can only view them as such. The record informs us that mutual judgments having been obtained by each of the parties against the others as above stated, it was ordered by the Court that one should be a set-off and satisfaction of an equal amount against the other; and that Rivers, at whose instance the motion was made, should enter a *remititter* upon his judgment which done accordingly. The record shews no special causes of necessity or objection to the course.

Hence, the question arises,

1. Is it competent for a Court of Law, in the exercise of its legitimate and incidental powers, on motion, to order one judgment to be placed as a set-off to another between the same parties, in the same Court; and this without shewing on the record any peculiar reason or necessity for it.

2- Is such order subject to revision in error.

In the case of *Davidson, for McKim vs. Geoghan*,<sup>3 Bibb, 231</sup> where a motion was made of a similar kind, the Court ruled that the authority to set one judgment against another between the same parties, was a power incident to courts of law, as well as equity; and that the same could be done with propriety, if from the circumstances it were found consistent with the principles of equity. In that case, however, the set-off was refused, on the ground that it would pre-

judice the rights of a *bona fide* assignee of the judgment; that no connection existed between the judgments or accounts proposed to be set-off; and by the terms of the contract it was not the understanding of the parties that one of the demands should be received in payment of the other.

In a note subjoined to that case, by the Reporter, reference is made to many English decisions, shewing that the power for setting one judgment against another, does not depend upon the statutes of set off, but upon the general jurisdiction of Courts of Law over suitors; that it is a part of their equitable jurisdiction.

\* 14 Johns.  
Rep. 63.

The same authority is believed to have been recognised by the Courts of most of the States of the Union. In the case of *Simpson vs. Hart*,\* the subject was extensively investigated by the Court of Errors of New York. It was there ruled that a Court of Law allows sets-off of judgments *ex gratia*; but a party applying to a Court of Equity, is entitled to it as a matter of right: that it is not necessary the judgments should be in the same right; it is sufficient if the judgment prayed to be set-off, may be enforced at law against the party recovering the judgment to be diminished or satisfied by the set-off. That in directing a set-off of judgments, Courts of Law proceed upon the equity of the statutes authorising sets-off, the power not being within the letter of the act. Their power consists in the authority they hold over suitors in their Courts, and that the exercise of the authority is the exertion of the law of the Courts, rather than any known, express, or delegated power. In the case last referred to, as in the case reported in *Bibb*, it is said suitors may ask the interference of

Courts of Law, in effecting a set-off, not *ex debito justitiæ*, but *ex gratia curiæ*; and it was also ruled, that a decision of a Court of Law, upon a summary application to its equity, is not such a *res judicata*, as to preclude Chancery from examining the question; nor is Chancery concluded wherea new fact is disclosed, which was not presented to the Court of Law.

In this case, it may be observed that, even if we could assume the fact that the judgment which was allowed as a set-off, has been since reversed, on general principles of law, it would not follow as a consequence, that justice or equity requires a reversal in this. Cases may occur, in which it would be entirely equitable and right to allow one debt or demand to be placed to the satisfaction of another; and which Chancery would direct; but which Courts of Law have no authority, under the statute, to allow before judgment.

On the 2d point—it does not appear that the question was raised or examined in the case in *Bibb's Reports*, whether an order setting one judgment against another, was subject to revision in error, but the Court exercised the jurisdiction, and reversed the order of the inferior Court. In as much, however, as the question was not investigated, nor any opinion of the Court expressed directly on it, it can not be regarded as an authority determining the principle. But in the case decided in 14 *Johnson's Reports*, to which I have particularly referred, the investigation fully embraced this point; and it was there admitted by all the members of the Court, that decisions on such summary applications can never be thrown into the shape of records, and become the subject of revision in any other Court. This we adopt as the correct rule of

practice, and conceive no serious injury can result from it; as the summary proceeding cannot be regarded as *res adjudicata* which will conclude either party from the benefit of any equity to which he would otherwise have been entitled. The propriety of this rule is further sustained from the consideration that the power of setting one judgment against another is a matter more appropriately due to Chancery.

We are therefore of opinion, that the writ of error must be dismissed.

#### PHILLIPS *versus* SCOGGINS.

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The written acknowledgment, of a husband, of a note. executed by his wife ; though the note may originally have been void in itself; becomes, by such acknowledgment, under the statute of this State, the note of the husband ; and it is not necessary to set out in the declaration any consideration on the part of the husband, for such acknowledgment.

Scoggins brought the action of assumpsit against the plaintiff in error, in the County Court of Greene.

The cause of action was a promisory note, executed by the wife of the defendant ; on which the latter had written an acknowledgment.

On demurrer to the declaration, judgment was rendered for the plaintiff, and the defendant by writ of error brought the case to this Court. The question presented was, whether any act of the husband, rendered the note of the wife valid, without a special disclosure in the declaration of a new consideration.

*Vandegraaf*, for plaintiff—*Gayle*, *contra*.

PERRY, J.—In this case the action was brought on a note given by Mary Phillips the wife of the defendant James Phillips, on which the defendant Phillips, had written, I acknowledge the above. The defendant, Phillips, demurred to the plaintiff's declaration, which was by the Court overruled, and judgment given for the plaintiff. The overruling the demurrer is now assigned for error, and presents the question for the consideration of this Court, can a husband bind himself to pay a note executed by his wife. We are of opinion he can. Although the note given by the wife was void, yet the husband having adopted it as his own, made himself liable for the payment of its contents, the note being *prima facie* evidence of consideration under our statute until the contrary is made to appear. The case cited, is not like the one before us. In that case the wife during coverture, had given her note: after the death of the husband, she was sued on the note,—the Court held, she was not liable, because when the note was given it was void; and that no subsequent act had made it good. But in the case before us, it is the same as if the husband had originally given the note himself. By his writing on the note, he adopted as his own act, what his wife had done; we are therefore of opinion the judgment should be affirmed. <sup>1 Stran.34</sup>

TAYLOR, J.—In this case it appears that a promissory note was given by the wife of Phillips to Scoggins; and that afterwards Phillips wrote as follows, under it: "I acknowledge the above;" and signed it. He was sued, and judgment rendered against him. It is insisted here, that the note in itself was void, and that to authorise a recovery against the husband,

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M'GREWS vs. M'GREWS.

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a consideration, for his promise should have been set out in the declaration.

At common law, this would certainly have been the case; but under our statute, I consider such averment of consideration unnecessary. Every written promise, by that statute, is made *prima facie* evidence of consideration, and the only construction which can be given to this act of the husband, is a promise to pay the amount of the note given by the wife. As the law presumes a consideration for this promise, it devolved upon Phillips to show there was none. Let the judgment be affirmed.

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McGREWS *versus* McGREWS.

A will of personal estate, is not necessarily void, for want of subscribing witnesses.

The Orphans' Court has peculiar and original jurisdiction over the subject of the probate of wills and its decree in relation to the establishment of a will must be taken as properly entered, upon legal testimony, unless the contrary appears.

This case was brought by writ of error, from the Orphans' Court of Clarke county; and raised the question, in this Court, of the validity of the will of one Clarke McGrew.

The record showed, that the parties in interest, having been cited to appear, and show cause why the said will should not be admitted to probate; and they having appeared by counsel, and shewed no sufficient cause to the contrary; and the said will having been duly proven; was regularly admitted to probate as to the personal estate of said McGrew.

*Wilson, for Plaintiff—Bagby, contra.*

CRENSHAW, J.—In this case, it appears by the record, that a paper, purporting to be the will of Clarke McGrew, under his hand and seal, and disposing of his estate, both real and personal, was offered for probate before the Orphans' Court of Clarke county.

The record further shows, that the persons interested in the estate, and who are expressly named, were duly cited to appear and shew cause why the same should not be admitted to probate; and that they having appeared and shewing no sufficient cause, the said will was duly proved and admitted to probate, and declared to be valid as to the personal estate.

It is now assigned for error, that the will is without witnesses, and therefore void: and it was further insisted on in argument, that the record does not shew the proof on which the will was allowed; and probate granted.

A will of personal property is not void because it has no subscribing witnesses. A will may be good as to the personal, and void as to the real estate. To pass the real estate, subscribing witnesses are necessary. The will, I apprehend, would be *prima facie* void, if from its face, it is apparent that the testator intended to do some further act to give it effect. But nothing of this kind appears from the face of the will in question. It does not appear that the testator intended to have it subscribed by witnesses. It concludes, "witness my hand and seal," and is signed and sealed by the testator, without saying in presence of witnesses, or leaving a void space for them to subscribe their names.

The record does not inform us what evidence was

received by the Judge of the Orphans' Court, but it does inform us that the will was duly proved, and ~~that~~ the parties interested in the estate, were duly cited to contest the will.

We must presume that a Court of competent jurisdiction acted correctly, unless the contrary appears; that it had sufficient evidence to authorise an allowance of the will; and if the party contesting the same was dissatisfied, he should have taken his exceptions and brought the evidence before this Court.

The Orphans' Court, having peculiar and original jurisdiction over the probate of wills, we can not presume against its orders and decrees; we can not infer that the Court allowed the will without legal testimony, and that the parties were not cited to contest the same, when by the record we are told that these things were duly done.

If the will was not proved, or if the parties were not cited according to law, the plaintiffs in error should have made the facts to appear; otherwise we will presume that the Orphans' Court acted correctly on a subject matter peculiar to its own jurisdiction.

We are unanimous in affirming the order allowing the will as to the personal estate, and granting the probate.



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TATE *vs.* INNERARITY.

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TATE *versus* INNERARITY.

The rate of interest, stipulated to be paid on a contract, in the absence of written or statutory law, may be fixed by a jury, according to the custom of the place, where the contract is made.

This was an action of assumpsit, on a promissory note, brought by Innerarity in the Circuit Court of Baldwin. The note bore date at Mobile, and was executed while that city was a Spanish province: it stipulated for the payment of interest after maturity; and the question raised, was as to what rate of interest was legally chargeable thereon. It was in proof that no written law was known in Mobile at that time, under the Spanish government, regulating the rate of interest; but that by the custom of the Merchants of Mobile, a certain rate was usually charged.

On this state of facts the Court charged the jury. that they might allow interest, at the rate usual, by custom, at Mobile.

To this opinion the defendant excepted, and there being a verdict against him, he took a writ of error.

PERRY, J.—This was an action of assumpsit, brought by the defendants in error as the surviving partners of John Forbes & Co. against the plaintiff in error. The defendant in the Court below, who is plaintiff here, plead the general issue—payment—that the note was obtained by duress of imprisonment, and by threats—and the statute of limitations. The jury found the issues in favor of the plaintiffs below. On the trial a bill of exceptions was taken, which presents the following facts: that the defendant in the Court below at Mobile, on the tenth day of October,

1811, made his promissory note, by which, on or before the first of March next ensuing, he promised to pay Messrs. John Forbes & Co. of Mobile, or their order, six hundred and seventy-five dollars and five rials, for value received of them, with interest after due. The plaintiffs also read in evidence a letter addressed to one of them, from said defendant, dated 24th November, 1817, in which it is said he hoped, his long silence would not cause the one, to whom the letter had been addressed, any uneasiness about the debt which he had named to him sometime back, as he had made use of every possible means to procure the money,—that he had the promise of it on the third day of January, and should that fail, he would have his cotton ready for market.

The Plaintiffs in the Court below, also proved by the deposition of a Mr Hannah, that he, as agent for plaintiffs, on the fourth day of October, 1819, presented the note sued on, and some accounts in favor of plaintiffs, to the defendant, who acknowledged the note and promised to pay it, with the interest due thereon, and part of the account, in four or six weeks; and then offered to pay in silver, three hundred dollars, if a premium would be allowed him for the silver. The deposition also proves, that it was the custom of merchants before the change of government, to charge from eight to ten per cent. interest on money. The witness also states, that he was ignorant of any written law allowing interest upon debts contracted within the Spanish provinces, in which Mobile was at the time the debt was contracted, and at the maturity of the note. Upon the foregoing facts the Court charged the jury—that if they believed, from the evidence, it to have been the custom of

merchants in the country where the note was made, in the absence of any written law upon the subject, to receive from eight to ten per cent. interest, they might allow the rate of interest collected by merchants according to the custom of the country.

In giving this charge it is said the Court erred, and is the only question raised by the record for the decision of this Court, and in answer to which, we hold it as a principle of the common law, that parties to contracts could stipulate for the payment of reasonable interest, and if no rate was stipulated, the customary rate for the use of money, could be proved and recovered. In the absence then of any written or statutory law, regulating the rate of interest, we know of no better rule, than to leave the rate to be fixed by the custom of the place where the contract is made, unless the parties fix the rate for themselves. In the case before us, interest was stipulated to be paid after the maturity of the note, the rate was not fixed, thereby, leaving it to be regulated by the custom of the country, as matter of proof for the consideration of a jury, when their intervention became necessary.

We are therefore, of opinion the Court did not err, in the charge given, and judgment is affirmed.

CRENSHAW, J. not sitting.

REPORTS  
OF  
THE DECISIONS  
OF  
THE SUPREME COURT OF ALABAMA,  
JULY TERM, 1831.

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TOWNS, Ex'r. *versus* BARDWELL, Adm'r.

The statute of limitation, generally, does not operate on a contract, until the party is within the jurisdiction of the State, where sued.

A replication to a plea of the statute of limitations, *that the maker of a note, at the time of its execution, resided in the State of North Carolina; and had not resided in Alabama, six years before the issuance of the writ, held good, on demurrer.*

*Semble*—It would not be so, if the statute had perfected a bar before the parties removed from the jurisdiction where the contract was entered into.

This action was debt in the Circuit Court of Franklin, and was founded on a promissory note executed by Felton, the testator of Towns, to Bardwell, the administrator of Celia Guin. To the suit, the defendant plead the statute of limitations of six years: to which it was replied, that Felton, the testator, had executed the note in the State of North Carolina; and had not resided in the State of Alabama for the

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term of six years, next before the issuance of the writ. On demurer, the Court held the replication good: and judgment on writ of enquiry being had for the plaintiff, Towns by a writ of error sought a revision of the question here.

The case was argued by *Ormond* for plaintiff; and by *Wm. B. Martin*, for defendant.

On the part of plaintiff it was said—that the decision of the Court on the demurrer amounted to this—no matter what time had elapsed in another State, yet if the party had not resided six years in this State, his plea was bad. In a case of slander, brought six months after the removal of a party, though the slander might be twenty years old, yet it would not be barred. Again in case of a note, of twenty years standing, after all evidence of payment was destroyed or lost, on this decision it could be recovered.

The statute only contemplated citizens of this State, not all the world, and does not meet a case of this kind.—*Ala. Dig.* 460.

The statute does not operate on foreign contracts.—1 *Caines*, 402.

When the statute begins to run, it continues.—1 *Johns*. 165.

For defendant it was insisted, that plaintiff should have rejoined. Any exception he was entitled to, was not properly to be noticed on demurrer.

The only fact necessary to render the replication good, is alleged—2 *Mas. R.* 89.—*Dean & Earle vs. Pitts*, in this Court.

LIRSCOMB C. J.—This action was founded on a promissory note, dated 28th March, 1820, and payable two days after date. The defence set up was, that the cause of action had not accrued within six years. The plaintiff replied, that William Felton, the defendant's testator, at the time the note was executed, resided in the State of North Carolina, and had not resided in the State of Alabama for the term of six years next before the issuance of the original writ in this case, &c. To this replication the defendant demurred, on which demurrer, the Court below, gave judgment in favor of the plaintiff; and this judgment is now sought to be reversed. The plaintiff in error urges, that the statute of limitations of personal actions of this State must govern; and that it commences running from the maturity of the note. It is argued, that this case does not come within the exceptions in our statute, that the defendant had never removed from this State; and had done nothing to prevent suit being brought against him. He contends, that the replication furnishes no answer in law, to the defence set up; that if the replication should be sustained in a country like ours, where emigration and change of residence are so frequent, it would be productive of serious hardship, and much fraud. Stale demands, he alleges, would be raised and prosecuted after the receipts and other evidences of payment and satisfaction had been lost or forgotten.

The most important question presented by the record, and the one that must dispose of this case, is, as to what time we shall fix for the statute to commence operating on the contract on which this suit was brought. The plea is, that the cause of action

had not accrued within six years. If the right of action accrued at the maturity of the note, as contended for by the counsel for the plaintiff in error, the defence would then be complete: if however, the right of action did not accrue until the maker of the note placed himself in a situation to be operated on by the process of our Courts, his defence must fail him.

Statutes prescribing remedies, have always been confined in their influence, to the Courts of the State or sovereignty by which they have been ordained or enacted: a distinction is recognized between a right, and a remedy for enforcing a right; the right is uniform, fixed, and unchangeable: but when a right withheld or denied, is sought to be enforced or remedied, the party seeking such redress must be governed in the *modus operandi* for obtaining such redress, by the rules of the forum to which he resorts. Our statute of limitations then, in its limited operation, could not apply to the contract under consideration, until the defendant had placed himself within the jurisdiction of our Courts. This seems to be the most sensible construction that can be given to the terms used in the statute, and would be the most obvious conclusion even if the question was *res integra*. But it is not now for the first time to be decided: this construction has been given by eminent Judges to similar statutes. In the case of *Ruggles vs. Keeler*<sup>3</sup> Judge *Kent* is very explicit in laying down the doctrine, that the statute does not operate until the party is within the jurisdiction of the State; and he shews, that this had been the uniform rule of decision under the English statute; that it is not limited in its operation to English subjects, but extends to

<sup>3</sup> Johns.  
R. 263.

all suitors who seek a remedy in their Courts. The same doctrine is held in *Massachusetts*,<sup>\* 7 Mass. R. 515, & 14 Mass, 203.</sup> and it is confidently believed that not a single adverse authority can be found. We are therefore of opinion that the replication in this case is good, and was properly sustained. But in acknowledging the generality of the rule, that the statute of limitations applies to the remedy and not to the right, we wish not to be understood as committing ourselves to sustain the rule to the full extent, that has been claimed for it by some eminent jurists. We in this case only decide, that if the bar has not become perfect, the statute does not affect the right. If, however, the statute had interposed and perfected a bar to a recovery before the parties removed from the jurisdiction where the contract was entered into, some of us at least would pause and hesitate much, before we would set aside that bar, and open the remedy to the enforcement of the contract. I should incline much against authority, I admit, to the opinion, that after the statute had fully performed its functions and consummated its object, the bar to a recovery so affected, would assume the dignity of a right.



ISBELL *versus* MORRIS AND BELL & CO.

Where a party neglects in a suit at law, to take advantage of an entire failure of consideration then within his knowledge, he will not afterwards be permitted to appeal to equity for relief.

This case originated in a bill, filed in Franklin Circuit Court, to enjoin a judgment at law. The facts as alleged in the bill, showed that in March, 1824, the complainant, together with one Thompson, had executed to Morris a bond for two hundred dollars; which Morris immediately assigned to Bell & Co. The consideration of the bond, consisted in the agreement of Morris to conduct, for the complainants, a house of entertainment. Bell & Co as assignees of Morris, pursued the bond to a judgment, to enjoin which the bill was filed. The bill charged a general failure of the consideration—the carelessness, the waste and neglect of Morris in the business for which he was employed—his intoxication while so employed, and his insolvency; together with fraud in the assignment of the bond. The answer of Morris admitted the contract, but denied the failure of consideration, and the intoxication and waste—affirmed that he pursued his employment, till directed by complainant to desist, and insisted that there was no fraud in the assignment to Bell & Co—confessed his insolvency, but charged that it was known to complainant; and relied on the fact generally of the whole matter having been adjudicated at law.

The answer of Bell for himself and partners, merely contended for the fairness and good faith of the

assignment made to them by Morris, and relied on the decision at law as to the defence of the complainant.

On the final hearing of the cause, the bill was dismissed, and to reverse this decision, the following errors were assigned in this Court :

1st. That the Court erred in the final decree dismissing the bill.

2nd. That the Court erred in not perpetuating the injunction.

*Ormond* for plaintiff in error.—

It will be perceived that the consideration of this note, was, that Morris, should manage a house of entertainment. Suit was brought on the note, and the whole amount recovered. It is on the judgment thus obtained, that we pray relief. The articles of agreement were entered into at the same time that the note was executed. On an examination of the record, it will also be perceived, that the answers of the defendants, do not very strongly deny the allegations of the bill. It was in proof, that Morris was not competent for business—that he refused to attend to his employment, and was of great disadvantage to Isbell. Here the defence could not have been made at law. The failure of consideration was partial, and no defence subsisted, except in equity, or by cross action, and indeed a cross action here would avail nothing—Morris is insolvent. The case is clearly made out; the answer is evasive, and the depositions taken in the cause, prove the statements of the bill. The only question is, is there equity in the bill? Shall Morris recover two hundred dollars for five or six days service? It is a clear case of equity.

Why, I would insist, was the note assigned so soon by Morris? Is it not apparent that he never intended to comply with his contract? The contract was rescinded, and the assignee of Morris, stands in no better situation than himself.

*W. B. Martin, contra.*—

If it be true that Morris did nothing at all in reference to his undertaking, the failure of consideration was complete; therefore, there was a good defence at law. • The parties took his obligation knowing that he was insolvent—the agreement or obligation was the consideration, not the service itself. Who is to blame? The complainant let his paper go, and was satisfied with the obligation of Morris. We, the assignees, are innocent holders—we have paid money and are not to lose it. The complainant is in fault, and must the public suffer by that fault? Is it not a fraud upon the public? The complainant has no equity. The note was negotiable, and Isbell took the responsibility against Morris for damages, as the consideration. We have more equity than he. The proof, in support of the bill, is defective. The witness as to Morris' incompetency, is discredited, and other witnesses prove that the house was kept well. Now in order to sustain the bill against the answer, two witnesses are necessary, who can be believed: here they do not produce two good and creditable witnesses. Again, the case is strong in this, Morris was ordered off. He went away reluctantly; and it was the complainant's fault. Isbell had a defence at law according to his own shewing, when the failure was plead, and proved unavailing.

*Ormond*, in reply.

The rule of law is, that if the answer is absolute, then two witnesses are necessary: here, I contend, there are two witnesses.

If the covenants are independent, the case is stronger, for then there is no other remedy, than in equity. So far as the assignees are concerned, to pay them the money, would be to throw it away. They certainly have no equity. They held debts against an insolvent man, and are not in a worse situation, now, than before. The note was not made to defraud them, and their equity, cannot be superior to ours. The entire case presented no defence at law—the failure was only partial, and therefore only cognizable in equity.

SAFFOLD, J.—This writ of error was prosecuted for the revision of a decree of the Circuit Court of Franklin, dismissing the bill at the cost of the complainant Isbell; in which decree there is charged to be error.

The object designed and effected by the bill was to obtain an injunction against a judgment at law, rendered against Isbell on a bond for \$200, executed by the complainant and Robert Thompson in favor of Morris, and by him assigned to S. Bell & Co, the plaintiffs at law. The ground of relief relied on, was a failure of the consideration of the bond.

The hearing was had on the bill, answers and proofs, from which we assume as the only facts material to be noticed—that in March, 1824, articles of agreement were entered into by Thompson and Isbell of the one part, and Morris of the other, stipulating a contract, that the latter with the assistance of his

family should live at, and keep a house of public entertainment for the former, until the end of that year, and give all necessary attention to travellers, and promote as much as in his power, the interest of the house. For these services he was to receive two hundred dollars, and for the payment of which, Isbell and Thompson gave him their note for the amount, at the same time of the execution of the articles, payable at the expiration of the term, during which the house was to have been kept. The bond, immediately after given was assigned by Morris to Bell & Co. The bill alleges a violation of the agreement on the part of Morris, by his continued intoxication, neglect of business, carelessness and great waste of the liquors, &c; furnished for the use of the house by himself and Thompson; and also by his voluntary abandonment of the house and employment, after about four days, and consequently a failure of the consideration of the contract. The bill also charges, that at the time of the execution and transfer of the bond, Morris was notoriously insolvent and has continued so; that within a few days after the transfer of the bond to Bell & Co, and before they had completed payment for the same, they had notice from complainant of the failure of consideration, and that the demand would not be paid; that the bond was transferred in consequence of the insolvency of Morris, and merely for the purpose of covering the debt and securing it against his creditors.

The separate answer of Morris admits the contract as charged, but contests the failure of consideration—denies the intoxication, neglect or waste imputed to him, and contends that he performed his part of the contract, in taking charge of the house with the

assistance required, and that he properly performed the trust until Isbell became dissatisfied and directed him to cease; that he then did so with reluctance. He admits his insolvency; says it was known to Isbell when the contract was made. He denies the existence of any fraudulent intent in transferring the paper, avering it was done to satisfy debt justly due from him, and which he describes, to nearly the amount of the bond: and that it was agreed the small balance when collected should be returned to him. He also urges in bar of the relief sought, that all the matters complained of were relied on at law, where they were properly cognizable, and after full defence so made, the grounds were found insufficient.

Bell answers for himself and partners, that the transfer of the bond was in good faith, on the consideration and for the purposes averred by Morris, and that all except a small portion of said consideration was paid by them for the bond, prior to the alleged notice of the consideration having failed. He disclaims any particular knowledge of the failure and requires proof of the fact: he, also, in like manner with Morris insists on the benefit of the decision at law, in bar of relief sought in chancery.

The proofs on the part of Isbel, the complainant, consist of the testimony of A. Twetty and wife, the latter of whom, as respects Morris' situation and attention to the house during the few days he remained, goes far to sustain the allegations of the bill. Twetty himself no less sustains the allegations in these respects, and swears, moreover, that he was present when Morris declined the employ; that he did so voluntarily; and from a knowledge of his conduct while there thinks he was a disadvantage to his employers.

Benjamin Harris, the only witness on the part of the defendants, states nothing material ; what he says of the credibility of Twetty is in terms so vague and irregular, as to avail nothing.

Under these circumstances was the complainant entitled to relief in chancery, or was the bill correctly dismissed? Morris' services, during the short time while the engagement continued, resulting as they did in a disappointment to the complainant and Thompson, and subjecting them to the trouble and necessity of removing his family and effects from the place, and making a different arrangement (as his answer admits to have been the fact) can not be supposed to have produced a balance of profit to the employers. If, therefore, Morris had materially violated the contract, or voluntarily abandoned it, he had no legal or equitable demand for compensation. If, on the contrary, he had complied with the agreement during the time, and was forced by the other parties to decline the situation, from the force of the contract, the services rendered, the inconvenience and disappointment produced, he was entitled to the full benefit of the contract, consequently to a recovery of the amount of the bond. The mutual stipulations of the parties, whether viewed as dependent or independent covenants, would be subject to the same rules. Nor is it material to decide whether the proofs sufficiently establish the fact, that Morris had so violated the agreement on his part as to authorise the employers to rescind it, as alleged in the bill, and denied in the answer. In either case it was a matter of proper legal cognizance. If complainant was warranted in rescinding the contract, he did what was requisite on his part in due time, by discontinuing the engagement,

and giving notice to the assignees that they might look to their safety. If at the time of giving the bond, it was agreed and understood by the parties in interest, that the same should be immediately transferred to Bell & Co, to answer other purposes, and that the same should be paid in any event, that, as well as the other features of the case, was a proper subject for the consideration of the jury. Would the complainant object that error or injustice was done him in the trial at law? The answer is that he should have sought redress at the trial by excepting to the opinion of the Court, or by motion for a new trial, as the case authorised. Every material fact in favor of the complainant, was alike susceptible of proof at law; if he did not make the proofs, or having made them, did not claim or could not obtain the benefit thereof, it was his default or misfortune. The evidence does not show a partial failure of consideration—on the contrary the complainant contended for an entire failure, so that in any view of the case, the relief, if any was allowable alone at law. Could it be otherwise considered, the complainant was equally conversant with all the circumstances pending the trial at law, while urging his defence there; and no reason or excuse is offered why he did not resort to chancery instead of litigating the claim at law. This circumstance interposes a further objection to relief in chancery. These rules have so often been recognized by this and other tribunals, that it is deemed unnecessary to refer to particular authorities.

Let the judgment be affirmed.

PERRY, J. not sitting.



BROWN *versus* ADAIR.

The certificate of a Judge to the exemplification of the record of another State, "that the attestation of the Clerk of the Court, is in proper form," is sufficient to authorise the admission of such exemplification in evidence.

The act of Congress of 1790, does not require the presiding Judge or Justice, to certify that the Clerk, is Clerk at the time he attests the exemplification.

In error from Lawrence Circuit Court.

This was an action of assumpsit, to recover of the defendant the amount of a note of hand, assigned by him to the plaintiff. On the trial of the cause in the Court below, the plaintiff offered in evidence the exemplification of the record of a judgment existing in the Circuit Court of Barren County, in the State of Kentucky, containing the certificate of the Clerk of the said Court, together with the attestation of the presiding Judge, that said certificate "was in due form of law." The counsel for the defendant objected to the reading of the transcript to the jury, on the ground, that the certificate of the Judge was not sufficient. The Court sustained the objection, and excluded the exemplification from the jury, on which a verdict was rendered for the defendant.

Exception was hereupon taken to the opinion of the Court, excluding the said transcript from the jury, and the same in this Court assigned for error.

*Ormond* for Plaintiff.

Would a Judge sign a certificate if it was improper? His act should receive the most benign interpretation. It is not to be supposed that the Judge would certify under false circumstances. There is a courtesy due to Courts of other States, and frivolous

objections should be rejected. It is not to be feared that a forged record could creep in, and the difference between the time of the certificates was only four days.

*Clay & Thornton, contra.—2 Stew. 27.*

CRENSHAW, J.—The error relied on in this case is, that on the trial in the Court below, the presiding Judge excluded from the jury the exemplification of a judgment obtained in Kentucky, on the ground that the Judge who certified the record, did not state in his certificate that the Clerk who attested the record, was Clerk at the date of his attestation.

The statute of the United States, passed May 1790, provides "that the records and judicial proceedings of the Courts of any State shall be proved or admitted in any other Court within the United States, by the attestation of the Clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form."

The statute requires the Judge to certify nothing more, than that the attestation of the Clerk is in due form. It does not require him to certify that the Clerk was Clerk at the date of his attestation, or at any other time; though it is difficult for the Judge to certify without shewing that he is Clerk.

We are therefore of opinion that the Circuit Court erred in excluding the exemplification, and that for this error the judgment must be reversed and the cause remanded.

We are aware that in this adjudication, we are overruling a principle of decision settled in the case

## CASEY vs. BRIANT.

of *Johnson vs. Howe's* administrators, at the July term of this Court in 1829.\* In that case the judgment of affirmance was predicated on two grounds. 1st. That it did not appear from the Judge's certificate that he was presiding Judge or magistrate of the Court from which the exemplification was taken, and 2d. That he did not certify that the Clerk was Clerk at the date of his attestation.

The judgment was affirmed mainly on the first—and on the 2d ground as well as I remember, there was but a mere majority for affirming. And if I concurred, being now convinced of my error, I should have no hesitation in departing from that rule of decision, and adhering to what I now believe the law to be.

Judges TAYLOR & WHITE, not sitting. LIPSCOMB, C. J. dissenting.

CASEY *versus* BRIANT.

Where the Judge, to whom a petition for a *certiorari*, is presented, deems the facts sufficient to authorise the issuance thereof; the Courts will not afterwards entertain motions to dismiss, on the ground that the facts set forth in the petition are insufficient.

In cases where a party undertakes the prosecution of a penal action, and sues in the name of himself, and of the State; it is competent for the Court to render judgment for all costs, against the informer, if he fails to maintain the action.

Although in cases under twenty dollars, the Courts are privileged to decide, without a jury, yet a cause will not be reversed, merely because the Court (without objection from the parties) left it to be determined by a jury.

This, being one of several *qui tam* actions, was brought by Casey before a Justice of the Peace of

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Marion county, to recover of Briant, the tax collector of that county, the sum of twenty dollars, in each case, for not administering an oath to persons rendering in their list of taxable property. On the trial before the Justice judgment was rendered against the defendant in eight of the cases, who failing to appeal, afterwards took up the cases by *certiorari* to the County Court. A motion was made in the County Court to dismiss the *certiorari*, which being overruled, the cases were, by agreement, consolidated, and a verdict rendered in one of them, in favor of the defendant. A writ of error was subsequently taken to the Circuit Court in which was assigned the following reasons in favor of the reversal of the judgment of the County Court.

1st. That the County Court erred in granting the order for writs of *supersedeas* and *certiorari*.

2nd. That the defendant should have appealed.

3rd. That the defendant, in his petition, did not show any legal reasons to sustain it.

4th. That there was but one writ of *certiorari* and one *supersedeas* to bring up the eight cases, when there should have been one, for each.

5th. That there was no issue before the jury.

6th. That the trial should have been by the Court, and not a jury, the cases not exceeding twenty dollars, each.

7th. That the Court gave judgment against the plaintiff for full costs, he only being liable for half.

The Circuit Court, in considering the errors above assigned, affirmed the judgment of the County Court; and to reverse its decision, was the present case brought up.

*W. B. Martin*, for Plaintiff.

We contend that the *certiorari* should have been dismissed. One writ cannot bring up eight cases. The trial by jury should not have been extended to that case. We went into the trial without authority of law. There was no interest for the jury to compute. Again we insist there should have been a separate writ in each case; here there was but one writ and one petition.

The petition should shew merits, and here it shews none. The same shewing should be made, as in cases for a new trial. Why was not the appeal taken in due time? The reasons shewn, are entirely insufficient. The case was not brought up until half a year after the trial. Costs should have gone against all the parties to the record.

*Wm. Cooper*, contra.

The chief objection urged is, that there were eight cases, and that only one was filed. This is true, but there was a special agreement that all, should abide the decision of one.

As to the judgment for costs against one alone—true there is a statute, but it does not apply to such a case as this. Indeed I know of no case, like the present where judgment could have been rendered against the State.

*Martin* in reply. There is no provision exempting the State from costs. The costs are to be rendered against all the parties to the suit.

WHITE. J.—This, together with nine other cases, were commenced before a Justice of the Peace of Marion county, by John Casey, the plaintiff in error, who

sued as well for himself as the State, to recover of John Briant, the tax collector, twenty dollars in each case, a forfeiture for failing to administer the oath prescribed by statute to persons rendering a list of their taxable property. Judgments were rendered against the defendant in eight of the cases; he failed to appeal and afterwards removed them by *certiorari*, into the County Court. There was one petition, and but one writ, by virtue of which all the cases were removed. A motion was made in the County Court to dismiss for insufficiency apparent on the face of the petition. This was overruled, and a jury came, who gave a verdict for defendant, whereupon the Court rendered judgment against Casey the informer, for all the costs. A writ of error was prosecuted to the Circuit Court, where the judgment of the County Court was affirmed, and it is here said that this last judgment is erroneous. The errors assigned bring to our examination the proceedings of the County Court insisted on as errors in the Circuit Court, and there overruled, together with the inquiry, whether it was error in the latter Court to render judgment against the plaintiff in error for costs. As for the County Court overruling the motion to dismiss the *certiorari* for insufficiency appearing on the face of the petition, it has long been the established doctrine in this State, that the removal of causes from before a justice of the peace to a higher tribunal by *certiorari*, is nothing more than a substitute for an appeal by which another trial is had, and that if the Judge to whom the petition is presented, deems the facts stated, sufficient, the Courts will not afterwards entertain motions to dismiss. We cannot then say that there was error in overruling the motion to dismiss

because of the defendant's not assigning in his petition good cause for not appealing from the judgments of the magistrate.

The next error which I will notice is, that as the sum claimed was but for twenty dollars, the trial should have been by the Court, and not by the jury. It is true that the case might, and strictly speaking ought, to have been tried by the Court; but as the trial by jury is esteemed by our laws the most unexceptionable mode of ascertaining facts, and as a resort has been had to that method in the present case, without any objections on the part of the plaintiff, so far as we can learn from the record, he ought not now to be allowed to urge the exception. Nor can he sustain the error assigned, that there was in fact no issue joined; for if we were to admit the necessity of a formal issue in such a case, it was for the plaintiff who now complains, to have tendered that issue.

We believe also, there was no error in rendering judgment against the informer for all the costs. The law permitted him to sue in the name of himself and of the State, and partly for his own benefit. He undertook the prosecutions at his risk and upon his own responsibility, uncontrolled by any agency which the State could exert, and if he sued when he could not maintain his actions, nothing is more just than that he should pay the costs of his own rashness.

The only remaining question is as to the regularity of bringing all the cases into Court by one writ of *certiorari*, and the propriety of the Court entering judgments in the cases not tried, conformably to the decision of the one that was. This irregularity was cured, and the Court authorised to proceed in the

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manner they did, as we think, by the agreement of the parties. After stating the judgment in the case tried, the record shews substantially that there had previously been an agreement by which the right cases were to be consolidated, and that the cases untied should follow the decision of the one that was; whereupon the Court proceeded to render judgment accordingly. The cases were not in fact consolidated; for if so, they would all have been tried as one. Then to give effect to the agreement, as the record exhibits it, unobjected to by the parties, we must suppose that all the cases were to be considered in Court for trial, but that to simplify and facilitate the proceedings, the decision of one, was to control that of the other.

The judgment is affirmed.

TAYLOR, J. not sitting.

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FRISBIE, et ux. *versus* McCARTY.

It is essential to the validity of a parol gift, of personal property, that possession should accompany the gift.

To render a deed valid and operative, there must be a delivery of it, either to the donee—or to some one for his use; or into the proper recording office.

This action was detinue in Washington Circuit Court, to recover a slave. Under the pleas of the general issue, and the statute of limitations, there was a verdict for the defendant. The bill of exceptions sealed in the cause, showed the following facts.



In the year 1812, Thomas White, the father of Sally D. White, now Sally D. Frisbie, made his deed of gift, in which he gave to said Sally, the slave, the subject of the action—that at the time the said deed was executed, McCarty, the defendant, was present and witnessed the same—that White said to the witnesses, in the presence of his children and the negro, that he had given or delivered the same, as mentioned in the deed—that Mrs. White, the mother, proposed to White that McCarty should take charge of the deed, and have it recorded, which White declined, saying that he would have it recorded himself.—that the deed was subsequently burned in White's house—that at the time of its execution, White was free from debt—that Sally D. Frisbie was then about ten or twelve years of age, and that suit had been commenced within six years after she became of age. In 1814, White sold the slave in question to the defendant, McCarty, and executed a bill of sale for the same. It was further in proof that there was an actual delivery of the slave, for equivalent consideration—that McCarty spoke to White on the subject of the gift of his daughter, and offered to rescind the contract—that White refused, saying, the property was his own, that he had never delivered the deed, nor had it been recorded.—that he took a pen and erased from the deed, which he produced, the name of the slave in question, together with that of another, sold at the same time, It was also in evidence, that a deed of like character was seen several years after White's house was burned, in the clerk's office in Washington county.

Upon this evidence, the Court charged the jury, that it was essential to the validity of a deed, that

it should be signed, sealed and delivered. That while White retained the deed in his possession, the gift remained incomplete, and the deed was invalid. That in order to make a deed valid and operative in law, it was necessary for the donor to have made such a delivery of it, as would have placed it beyond his power of revocation. The Court further charged, that there was no such thing known to the laws of the State, as a parol gift of property, unless possession actually accompanies the gift.

CRENSHAW, J.—The question in this case is, whether the charge of the presiding judge to the jury, can be sustained by the law and the evidence?

The substance of so much of the testimony, to which I deem it essential to refer, is, that Thomas White, the father of Mrs. Frisbie, when she was ten or twelve years of age, by deed of gift, gave her the slave, which is the subject of the action—that other slaves were included in the deed given to his other children—that at the time of signing the deed, and in the presence of the slaves and of the children, White said to the witnesses, (of which the defendant was one) “I here give or deliver the negroes as mentioned in the deed, to these children, in your presence,”—That Mrs. White proposed that McCarty should take the deed and have it recorded, which White declined, saying, he would have it recorded himself—that subsequently, within a month, White's house was burnt and the deed destroyed—that about two years afterwards, White sold the negro in dispute, for a valuable consideration to McCarty, and erased the name of the negro, saying, he had never delivered the deed, and that it had not

been recorded. The witness, Lester, swore that in 1816, he saw a deed in the Clerk's office, purporting to be a deed of gift of several negroes from White to his children. When the deed was signed, White was in the attitude of moving with his family and property, and said he had fallen into unfortunate habits.

On this evidence, the Judge charged the jury, "that it was essential to the validity of a deed, that it be signed, sealed and delivered—that so long as White retained possession of the deed, without having delivered it to some third person, or to the Clerk to be recorded, the gift remained incomplete, and the deed invalid—that to give the deed validity, the donor should have made such a delivery as would have deprived him of the power of revocation, and that so long as he retained it, he reserved to himself the *locus penitentiae*, and that there was no such thing as a parol gift, unless possession accompanied the gift."

If any, or what other instructions were given, the record does not inform us.

It is laid down in the best authority, "that at common law, a gift of personal property to be good must transfer both the right of property and the possession of the chattel, whereby one person renounces and another person immediately acquires all title and interest therein, and which may be done either by writing, or by word of mouth, attested by sufficient evidence, of which, delivery of possession is the strongest and most essential, and that a true and proper gift must always be accompanied with possession, and must take effect immediately." In the case of *Smith vs. Higgins*, decided in this Court, the same principle is recognized.

According to this definition, actual possession must accompany the gift, at least where the gift is by parol: if the donor continue in possession, or in other words, if the possession be not actually transferred to the donee or to some person for his use and benefit, the gift wants what a learned commentator considers its most essential ingredient, and would be absolutely void.

If this be the law, which I think cannot be denied, then the charge in this respect, was legally correct. It was the province of the jury to decide, whether the proof established the fact of possession. The Court, unless requested, was not bound to inform the jury, that if they believed the facts to be proved, (as stated in the bill of exceptions) that they did or did not amount to such a delivery of possession as would satisfy the law. And to this effect, is the case cited from 2 *Peters* 14.

In that case, Judge Story, in giving the opinion of the Court, expressly says "that it is no ground for reversal, that the Court below omitted to give directions to the jury upon any points of law which might arise in the case, when it was not requested by either party at the trial—that it is sufficient if the Court has given no erroneous directions—that if either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the Court upon that point, and that the Court cannot be presumed to do more in ordinary cases, than to express its opinion upon the questions which the parties themselves have raised at the trial."

The case of *Goodwin vs. Morgan*, decided in this Court, establishes no rule or principle, which can

apply to the case before us. In that case, the Court seem to have been of opinion, that the formal ceremony of placing the hand of the slave into that of the donee, accompanied with words of donation, amounted to a perfect gift by parol. But the main question turned on the statute of North Carolina, which declared all parol gifts to be void. It was decided that the statute was intended for the benefit of purchasers and creditors; and that parol gifts were valid between the parties to the contract, if their rights did not conflict with the rights of creditors and purchasers.

I think the charge in relation to the deed, was equally correct.

That delivery is essential to the validity of a deed, ought not at this day to be called in question. So long as the donor retained possession of the deed, without ever having delivered it, either to the donee, if capable of receiving it, or to some person for his use and benefit, or into the proper office to be recorded, the gift is imperfect and the deed is void. It should be such a delivery as would deprive the donor of the power of revocation; for until then he reserves to himself the *locus penitentiae*.

In the case of *Kirk and others vs. Turner*, decided in North Carolina, the Court held, "that a delivery of a deed is the parting with the possession of it by the grantor, in such a manner as to deprive him of the right to recall it; and that where a deed was handed to the subscribing witness, as the agent of the grantor for the purpose of being proved, and was by agent delivered back to the grantor, without being proved, this was not a sufficient delivery." In that case the Court say "that a delivery of a deed

is in fact its tradition from the maker to the person to whom it is made, or to some person for his use." The Court further held, "that it was unfair to resort to the declaration of the donor, in which she stated, that she had given the property to her children, when her conduct in the transaction refuted all idea of a parol gift, and clearly shewed that she intended to give by deed and not by parol."

In the case of *Clavering vs. Clavering*, cited from 2d Vern. 473, the Lord Keeper does indeed say, that though the deed remain in the custody of the grantor, yet that did not give him the power to resume or alienate the estate; but in that case it is fair to presume that the deed had been duly executed and had taken effect by a formal delivery. And I now admit that when a deed is once executed and delivered, so as to take effect, that it is not in the power of the grantor to annul the deed or resume the estate, though the deed remain in his possession.

Whether there was or was not such a delivery, or whether the facts proved by the evidence amounted to such a delivery, were matters determined by the jury, and on which it does not appear that the Court was requested to give more specific instructions. The charge might have gone further, but as far as it did go, I think it was well sustained by the law and the testimony,

I am aware that this Court has decided, and I believe correctly, that the delivery of a deed may in some instances be presumed,—that where the donee is in possession of the deed, in absence of proof to the contrary, the law presumes a delivery. But it has never been decided here, or in any other Court, that an absolute deed was good, unless a delivery had been

established, either by express proof or by legal presumption.

Whether the deed was good or bad, our statute of frauds has no bearing on the subject, as between the present parties. If the gift had been completed by a delivery of the deed, the defendant, McCarty, being a witness to the deed, had ample notice; and his purchase would be void, though the deed was never recorded. The law is well settled, that the object of recording is to give notice of the incumbrance to creditors and purchasers, and if they have express notice from another source, this is sufficient, though the instrument be not recorded. I am for affirming the judgment.

COLLIER, J.—The plaintiffs claim title under a deed of gift from Thomas White, the father of Mrs. Frisbie, to a negro woman: the negro was delivered, but the deed was not. The defendant witnessed the deed, and several years thereafter purchased the negro in question, from the grantor. The presiding Judge instructed the jury "that it was essential to the validity of a deed, that it should be signed, sealed and delivered; that so long as Thomas White retained possession of the deed of gift, under which the plaintiffs' claim title to the negro in question, without delivering it either to some third person, or to the clerk to be recorded, the gift remained incomplete, and the deed invalid; that, in order to make the deed valid and operative in law, it was necessary for the donor to have made such a delivery of it, as would have placed it beyond his power of revocation; and that so long as he retained it, he reserved to himself a *locus penitentiae*."

The Court further instructed the jury, that there was no such thing known to the laws of this State as a parol gift of property, unless possession actually accompanies the gift.

The first branch of the instructions presents the question, whether delivery is essential to the validity of a deed.

Before a deed can become operative at law, it is well settled, that it must be delivered to the grantee, or some third person for him.\* This third person need not be first deputed by the grantee to receive the deed, but he may be a stranger—*Tant vs. Berry*;<sup>2</sup> *Doe vs. Knight*;<sup>3</sup> *Butler's & Baker's case*<sup>4</sup>—for the assent of the grantee will be presumed, unless he signifies his dissent. Nor is it important to the efficacy of a deed, that the possession of it should continue with the grantee—a possession retained but for an instant of time, invests him with the interests which it professes to convey to him, and they cannot be divested by the grantor's afterwards acquiring its custody, unless the custody be acquired and held under circumstances which authorise the inference of a fraud.—*Souwerbye & wife vs. Arden et al.*<sup>5</sup>

\* 4 Kent's  
Coun. 446.

<sup>2</sup> Dyer 167

<sup>3</sup> Barn &  
Cress. 671

<sup>4</sup> 3 Co. 26 b

<sup>5</sup> 1 John's  
Ch Rep 240

It will be unnecessary to enquire what circumstances are essential to a delivery. It is obvious that the facts of this case do not show that the deed was delivered, as its custody never passed from the grantor; and he manifested by his declarations that he did not intend to deliver it at the time of its execution.

The second branch of the instruction was uncalled for by the facts; for if the deed be invalid, the plaintiffs could not discard it and claim by force of the delivery of the negro, made at the time of the exe-



cution : that constituted but a part of the *res gestæ*, and had a reference to, and was dependent upon the deed.

So far as this case is concerned, it is unnecessary to give to it further discussion ; but as it has been suggested that other causes await the destiny of this, it may be well to consider, whether equity can lend any assistance to a voluntary deed inoperative at law, because of its non delivery. This question has been so frequently and fully examined, that I shall not attempt to present it in a new aspect.

A voluntary settlement, fairly made, is valid in equity, though the grantor never part with the possession of the deed, unless it manifestly appear that he never intended to relinquish his control over it. And the circumstance of his retaining the possession, apart from others less equivocal, will not prevent the interference of equity in favor of the grantee—*Sowerbye & wife vs. Arden & others.*<sup>a</sup>

The case of *Clavering vs. Clavering*,<sup>b</sup> goes further perhaps to sustain settlements, than any modern case has done ; yet I am not aware that its authority has been questioned. In that case, the father in 1684, made a voluntary settlement of an estate subject to some annuities, in trust for his grandson and his heirs, and afterwards in 1690, he makes another voluntary settlement of the same estate to other uses, and by will gives a considerable estate to his grandson. Although it was proved that the grandfather always kept the settlement of 1684 in his custody and never published it, it was after his death found amongst waste papers ; and the deed of 1690 was often mentioned by him ; and he told the tenants, that the person provided for by that deed was to be their

<sup>a</sup>1 Johns.  
Ch. R. 240  
6 Vez. jr.  
656, 2 P.  
Wms. 467.  
<sup>b</sup>ib. 357, 3  
Atk. 183.  
1 Vern. 464  
2 Vern 473

landlord after his death ; yet it was holden that the settlement of 1684 prevented the operation of that of 1690. The Lord Keeper, in declaring his opinion, observes, "although voluntary conveyances, if defective, shall not in many cases be supplied in equity, yet where there hath been a covenant to stand seized to the use of a relation, though it is a voluntary settlement ; yet this Court in the ancient of times, always executed such uses. In the Lady Hudson's case, where the father, having taken displeasure at his son, made an additional jointure on his wife, but kept it in his power ; and being afterwards reconciled to his son, cancelled the additional jointure, and died, the wife, after his decease, found the cancelled deed and recovered by virtue of it." The decree of the Lord Keeper was affirmed on appeal, in the House of Lords.

<sup>a</sup>1 Atk. 625. In *Boughton vs. Boughton*,<sup>c</sup> it was decided by Lord Hardwick, that one voluntary settlement could not be set aside by another, subsequent in point of time. To the same effect is *Villers vs. Beaumont et al.*<sup>b</sup> and <sup>a</sup>1 Vern 100 *Johnson vs. Smith*.<sup>c</sup> But equity will not carry an <sup>a</sup>1 Vez. 314 agreement into execution without a valuable or meritorious consideration—*Williamson vs. Codrington*<sup>d</sup>—<sup>a</sup>1 Vez. 512 so that a gift from one not related to the donor, will not receive assistance from chancery for its completion.

<sup>a</sup>1 P. Wms 577. In *Naldred vs. Gilham*,<sup>c</sup> the aunt made a voluntary settlement upon her nephew, a boy of four years old. The deed remained in her possession, and some years afterwards she made a different settlement on another nephew. The report of the case does not disclose the circumstances which attended the execution of the first deed. Lord Macklesfield refused to give ef-

fect to the first settlement, and concluded that from the fact of the aunt's keeping the deed by which it was made, and from other circumstances, that she was surprised and imposed on, in making it absolute and without power of revocation. In noticing this decision in *Boughton vs. Boughton*, Lord Hardwick remarks, that it is not applicable to every case, but is dependent upon particular circumstances.

*Cotton vs. King*<sup>2 P. Wms 359.</sup> was a case in which the mother made a settlement in trust for her children, and delivered the duplicate deeds into the hands of her attorney, "with a strict charge that he should not part with them," and no other person was privy to the transaction. Lord King held, the settlement was not binding.

In *Lant vs. Ward*,<sup>b Prec. in Ch. 182.</sup> the father executed a voluntary bond to his daughter, without condition, payable immediately. He retained the possession, and it was proved that it was never intended to be operative, but only designed to protect the father from the payment of taxes: it was therefore set aside.

In *Bunn & others vs. Wentthrop & others*,<sup>c 1 Johns. ch. R. 329.</sup> it was decided, that "a voluntary conveyance, or settlement, though retained by the grantor in his possession until his death, is good."

*McCall vs. McCall*,<sup>d 3 Day 402</sup> recognises the competency of chancery to effectuate a voluntary conveyance, made with a view to a family settlement.

In *Jones vs. Jones*,<sup>e Conn. R. 111.</sup> a father in consideration of natural affection, executed deeds of part of his estate, to two of his children, to secure a provision for them; but retained such deeds in his custody, and gave directions to his wife to lodge them with the town clerk for record, which was accordingly done. It

was held, that this was such an agreement as chancery would enforce.

It may be well to enquire, whether equity will perfect a voluntary settlement against a purchaser, with notice from the grantor. This must depend very materially upon a just construction of our statute of frauds. The 2nd section of that act declares all gifts, grants, &c. made on purpose to delay, hinder or defraud creditors, or to defraud or deceive purchasers, utterly void, and requires all conveyances to be registered, &c. This enactment bears an analogy to the statutes 13th & 27th *Eliz.* and the interpretation given to them in regard to voluntary conveyances, should be consulted in adjusting the true construction to be placed upon this. The determination of the four great Courts at Westminster, all concur in the conclusion, that a voluntary conveyance, though sustained by a good consideration, is void under these statutes against a purchaser for a valuable consideration, and it is immaterial whether the purchaser had notice of the prior deed—*Doe ex dem. Otley vs. Manning*,<sup>a</sup> *Doe vs. Martyn*,<sup>b</sup> *Hill vs. Bishop of Exeter*,<sup>c</sup> *Doe vs. Hopkins in Excheq.*<sup>d</sup> These decisions have been disapproved by very eminent Judges in England, as giving to the statute of 27 *Eliz.* an exposition unauthorised either by its spirit or phraseology. Mr. Justice *Spencer*, in *Verplanck vs. Sterry*,<sup>e</sup> says, there is a want of harmony in the English decisions on this point previous to our revolution; yet, he thinks “the preponderance in weight and number is decidedly adverse to the doctrine which now prevails in the Courts of Westminster Hall.” By a reference to the earlier decisions, it will appear that it was a matter to be left to the jury, on which they passed, whether

<sup>a</sup> *Evelyn v. Temple*, 2 Bro. 148.

<sup>b</sup> *East* 59.

<sup>c</sup> *Bos. & Pul.* 332.

<sup>d</sup> 2 *Taunt.* 82.

<sup>e</sup> *East* 79.

<sup>f</sup> 12 *Johns.* 555.

a voluntary conveyance as such was fraudulent. Among those who favored this course of decision, are mentioned Lord Hale, Lord Rolle, Chief Baron Gilbert, and Chief Justice Eyre; and among those opposed to it, are ranked Lord Hardwick, Chief Justice De Grey, and others. Lord Mansfield maintains the construction inculcated by the Judges who lived nearest the passing of the act.—*Doe vs. Rutledge*.<sup>Cowp.713</sup>

The 13 *Eliz.* which relates to conveyances with intent to defraud the creditors of the grantor has received a construction entirely different from the prevailing doctrine with regard to the 27th. Mr. Justice *Spencer* in the case referred to, is of opinion not only from the regret expressed by the Judges and Chancellors of England, but also from the evident discrepancy in the construction of the two statutes that the later decisions have been influenced by a sort of judicial expediency, rather than an adherence to the wording or meaning of the 27th *Eliz.*—it was to avoid the unsettling of estates.

But whatever considerations may have induced this unnatural construction of the 27th *Eliz.* they can have no influence in the exposition of our statute of frauds: we are free from their operation and may consult alone its language and spirit. It is doubtless the design of that act to avoid conveyances made with the intent to defraud creditors and purchasers: the intention therefore must ever be a material inquiry and this being a matter of fact, must be passed on by a jury.

Again—our statute expressly recognises conveyances, unaccompanied by possession, made not on a valuable consideration, when registered according to its requisitions. The object of registration is to give

notice to the world; yet it does not exclude the idea that notice may be given in some other way, and it is well settled upon authority, that it may be: when, therefore, a purchaser has actual notice, his purchase can not be sustained, by alleging the want of registration. He can not occupy a more favorable situation than the grantor: he stands in the same attitude. But the claim of a purchaser without notice, actual or constructive, would prevail against a voluntary grantee.

I have thought it proper, in order that the rights of the parties may be understood to examine the principles which the facts of the case suggest. I do not intend to intimate that the plaintiffs are entitled to recover in any *forum*; and as it is clear that they have no remedy at law, I decline making a particular application of the principles discussed.

The judgment is affirmed.

LIPSCOMB, C. J. not sitting.

PEDEN *versus* MOORE.

1sp 71
111 201

Wherever a defendant can maintain a cross action for damages, on account of a defect in personal property purchased by him, or for a non compliance by the plaintiff with his part of the contract; the former may in defence to an action upon his note made in consequence of such purchase or contract, claim a deduction, corresponding with the injury he has sustained.

*Sayl's* that where real estate is the subject of the contract, the rule above laid down is different—and a partial defect in title, while the contract remains unrescinded can not be alleged as a defence to an action for the recovery of the purchase money.

If an exception is taken to the *refusal* of a Court to instruct the jury, the bill of exceptions must embrace so much of the evidence as to shew that the instructions asked for arose out of the cause:—but if the instructions actually given by the Court are excepted to, as mistaking the law, then no part of the testimony need be stated.

## Debt in Fayette Circuit Court.

This was an action brought by Moore against Peden, to recover the amount of a promissory note. The defendant below plead failure of consideration, payment, and set-off. During the progress of the trial, the defendant below moved the Court to instruct the jury, that if they believed the consideration of the note had failed to the full amount, except what had been paid, they should give a verdict to the defendant. The Court refused to give the charge prayed, but instructed the jury, that unless a total failure of consideration was proved, they should find for the plaintiff; on which charge the jury found for plaintiff.

Peden having taken exceptions to the refusal of the Court to charge as required, and to the instructions thus given—assigned the same as error in this Court.

COLLIER, J.—The defendant in error brought his action against the plaintiff, upon a promissory note.

The pleas were, failure of consideration, payment, and set-off. On the trial the counsel for the plaintiff in error moved the Court to instruct the jury "that if they believed that the consideration of the note had failed to the full amount, except what had been paid, that they should find a verdict for the defendant:" which charge, the Court refused to give; but charged the jury, that although part of the money might have been paid, and that the consideration had failed to a larger amount than the balance due, yet, unless a total failure was proven, to the whole amount of the note, then they should find for the plaintiff the balance not paid. The record does not disclose any part of the testimony given on the trial.

This case presents a question of great intricacy—it is this: is the partial failure of the consideration of a contract available as a legal defence, in reduction of the sum sought to be recovered. The perplexity experienced in examining this question, arises not from its intrinsic difficulty, but rather from the great variety of decisions which have been made upon the point. Amidst this conflict of opinion, we are naturally led to a review of the authorities as the surest guide to a correct conclusion.

And I would premise, that it may be laid down as a legal position, that with regard to their efficacy and properties, there is no difference at Common Law, between verbal and written contracts; but the difference is between parol or written contracts and specialties. So far as this case is concerned, we have no statute varying the Common Law in this particular: hence every defence which may be made against a verbal contract, is allowable against one which is merely written.

\*7 Term R.  
350: Chit.  
on Con. 2.



*Starkie*, in treating of the consideration of Contracts says, that it is now completely settled that a partial failure, which may be the subject of an action for unliquidated damages, and which leaves the whole of a contract open and unrescinded, cannot be enquired into in an action on a bill or note; but where the partial failure arises from a fraud, it is a defence to the action.\*

\*2Starkie's  
Evi. 280

*Chitty*, in his *Treatise on Bills*, observes, that where the consideration of a bill fails, in part as to a specific liquidated amount, the fact may be shown in defence at law; but where a partial failure of consideration arises from unliquidated damages sustained by breach of a subsisting contract, the performance of which was the consideration of the bill, such breach cannot be investigated in an action on the bill, but the defendant must resort to his cross action.<sup>b</sup>

<sup>b</sup>Chitty on  
bills 7th A.  
edi. 71.

The younger *Chitty*, in his *Treatise on Contracts*, a publication of more recent date, remarks, that the Courts have of late, to prevent circuitry of action and unnecessary litigation, allowed a defendant in case of a partial failure of consideration, instead of bringing a cross action, to object, in reduction of damages, such partial failure of consideration.<sup>c</sup>

<sup>c</sup>Chitty on  
Con. 276,  
ib. Com. L.  
153, 1 Chit  
Pl. 4th ed.  
231, Chip.  
Rep. 159,  
3N. Hamp  
Rep. 455.

This may suffice to show the opinions of the latest elementary writers. We now proceed to an examination of the adjudged cases on which they predicate their assertions of the law.

<sup>d</sup>Peake's  
Cases 61

In *Barber vs. Backhouse*,<sup>d</sup> the payee brought an action on a bill of exchange,—the defendant paid part of the money into Court, and it appeared upon trial that there was no consideration for the residue. It was however urged for the plaintiff, that the pay-

ment of the money into Court, admitted the bill was good for part, and if it was good in part, it was good *in toto*. But Lord *Kenyon* declared himself clearly of a contrary opinion : whereupon the jury found for the defendant, and the Plaintiff acquiesced.

\* Peake's  
Cas. 216.

*Ledger vs. Ewer*,\* was an action by the payee of a bill against the acceptor : the consideration appeared to be, that the plaintiff had taken the defendant into partnership ; but on the defendant's friend's advice, he dissolved the connection. There was evidence of fraud on the plaintiff's part in drawing the defendant into the engagement, which Lord *Kenyon* left to the jury, with the instruction, that if they were against the defendant on the evidence of fraud, they should take into consideration the amount of damages which the plaintiff had sustained, and were not obliged to find more.

† 1 Camp.  
43, note.

In *Morgan vs. Richardson*,† the drawer of a bill payable to his order, brought a suit against the acceptor. The defence relied on was, that the bill had been accepted for the price of some hams purchased of the plaintiff by the defendant, to be sent to the East Indies, which were almost quite unmarketable. The sum for which they were sold by the defendant was paid into Court. Lord *Ellenborough* held, that though where the consideration of a bill fails entirely, this will be a sufficient defence to an action upon it, by the original party ; it is no defence to such action that the consideration fails partially, but that under such circumstances the remedy is by cross action.

\* 1 Camp.  
40, note.

In *Fleming vs. Simpson*,\* Lord *Ellenborough* ruled that if there was a fraud on the part of the seller, in shipping a commodity of a quality very inferior to

that ordered, it would constitute an available defence to an action predicated upon such sale; but if there was no fraud, the defence was not sufficient.

In *Denny vs. Daverell*,<sup>a</sup> Lord *Ellenborough* distinguished between a special contract and a *quantum meruit*: in the first case he remarked, it had been usual to leave the plaintiff to his cross action, for any negligence of which he complains; but in the latter, a just estimate may be placed upon his services, and if they are found to be wholly abortive, he is entitled to no compensation. <sup>a</sup> 3 Camp. 451

In *Basten vs. Butter*,<sup>b</sup> Lord *Ellenborough* took the same distinction. Mr. Justice *Lawrence* thought that even in the case of a special contract, the defendant might be let into the defence, if he has given notice to the plaintiff: and *Le Blanc*, Justice, thought that in either case the plaintiff ought to come prepared to meet the defence. <sup>b</sup> 7 East 479

In *Tye vs. Gwynne*,<sup>c</sup> the plaintiff as drawer and payee brought his action on a bill of exchange against the acceptor. The defendant proposed to prove that the bill was accepted for the price of goods sold for exportation, and the goods were of a bad quality and badly packed; so that the consideration for the acceptance had in a great measure failed. Lord *Ellenborough* held that the facts proposed to be proved did not offer a legal defence, and observed that "a bill of exchange cannot be accepted on a *quantum meruit*. There is a difference between want of consideration, and failure of consideration: the former may be given in evidence to reduce the damages—the latter cannot, but furnishes a distinct and independent cause of action." <sup>c</sup> 2 Camp. 346.

In *Germaine vs. Burton*,<sup>d</sup> it was decided if after a <sup>d</sup> Starkie N. P. Rep. 32

sale by sample, at an agreed price, goods of an inferior quality are furnished, the vendee may prove such inferiority and thereby reduce the recovery to their actual value. A note of the reporter, considers this case as founded upon the justness of permitting the vendee to object in diminution of damages, instead of forcing him to resort to a cross action upon the warranty.

<sup>a</sup>9 Barn. & Cress. 259. In *Poultton vs. Lattimore*,<sup>c</sup> the plaintiff sold to the defendant some *cinq foïn seed*, which he warranted to be new, good, growing seed. A short time after the sale, the buyer was told by a person who was a competent judge that the seed did not correspond with the warranty; but he did not give notice of the deficiency to the plaintiff, and afterwards sowed a part and sold the balance. It was held competent for the defendant to show the falsity of the warranty.

<sup>b</sup> 13 Johns. 302. In *Beecher vs. Vrooman*,<sup>b</sup> it was decided that in an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value in defeasance of the action: or if the value is only partially diminished by the deficit, he may show that, in mitigation of damages. No notice is taken of the distinction between a sale at an agreed price, and a *quantum valebat*.

<sup>c</sup> 14 Johns. 377. In *Grant vs. Button*,<sup>c</sup> it was decided in a case where the price of labor was expressly stipulated, that the plaintiff's claim may be diminished by shewing that the work was not faithfully done.

<sup>d</sup> 1 Mason 437. In *Miller vs. Smith*,<sup>d</sup> it was proved at the trial, that the consignees and agents of the plaintiff sold to the defendant a quantity of tobacco, under an express representation that it was as good as the defendant had before purchased of them:—the tobacco was de-

livered: and sometime afterwards the defendant complained that it was not as good as it was represented, and desired to rescind the contract, which the Plaintiff refused. The question of law was raised, whether the defendant was entitled to a deduction for the supposed misrepresentation. Mr. Justice *Story* in his charge to the jury observes "There is no pretence in this case that the representation was fraudulent. It was made, all parties agree, innocently under a misapprehension of the state of the tobacco, which had not been examined by the consignees." And again "where goods are sold as of a certain quality, and they turn out to be of an inferior quality, the defendant may in an action for goods sold and delivered, give the facts in evidence to reduce the damages: for the plaintiff is entitled to recover no more than the real value of his goods, The authorities directly support this doctrine: and there is neither reason or justice in straining after technical objections to overthrow it."

The case of *Crowninshield vs. Robinson, et al.*<sup>93</sup> 1 Mason was an action for negligence in keeping the plaintiff's sheep, founded on a breach of the defendant's special contract. The defendant insisted upon deducting from the damages the compensation due him for keeping the sheep. The Court say that they are fully aware of the strong leaning of the later authorities in favor of the doctrine which would tolerate the defence: but they thought it at most but an equitable set off, which should be allowed only when it cannot work against equity, and as the verdict would not necessarily be a bar at the suit of the defendant, and the plaintiff might be doubly charged, they thought it best to leave the defendants to their cross action. I

am sensible that this case did not present the question of a partial failure of consideration. I refer to it only to show, from the opinion of a very able court, the increased disposition manifested by recent decisions, so to adjust rights as to avoid multiplicity of actions.

This discrepancy in decision is a very full illustration of the uncertainty which pervades our system of jurisprudence. If the weight of authority be not favorable to an allowance of the defence, the contradiction is certainly so great, as to authorise us to consider the question as *res integra*, and pursue the more ancient rule which denies the defence, or else adopt more recent authority as our guide. In determining which course shall direct us, it is proper to consult the policy of our laws, and inquire what the dictates of justice demand.

It is our policy to avoid circuitry of action, that litigation may be stopped in its germ before it is permitted to put forth its branches. This idea is most strikingly illustrated by our statutes providing for arbitration and set off, as well as by the decisions of our Courts. Now to permit a defendant to allege in diminution of a sum sought to be recovered by breach of his contract, that the consideration which induced the contract on his part, has partially failed, would have the effect of making one action subserve the purpose of two: and upon the score of convenience it must be unimportant to the plaintiff whether his recovery is diminished, or whether after having recovered the entire sum which the defendant has agreed to pay him, he is compelled to refund a portion of it; or if important, the importance would consist in ending litigation and avoiding the costs of the defendant's

action. And surely it would be more compatible with justice to permit a party to retain that, which *ex æquo et bono* cannot be demanded of him, and which by law he may recover back: and more especially, when none of the great principles of right, or the landmarks of property would be disturbed.

Perhaps it may be said that the inquiry is too complex for the determination of an ordinary jury. Not so. There would be no more difficulty in ascertaining the sum to be deducted from the defendant's indebtedness, than in admeasuring the *quantum* of damages, sustained in an action for a false warranty, or for a deceit: in either case the jury will naturally inquire the sum which was agreed to be paid, and to what extent the consideration is deficient; so that the obstacles to the achievement of justice will not be greater in the one case than the other.

I am entirely aware of the decisions which inhibit the defence even of a total failure where there is a warranty on which the defendant may have his remedy. These decisions doubtless proceed upon the principle that the warranty is a subsisting contract, and the damages sustained by its breach unliquidated. I however consider them so far shaken, if not overruled, as to leave the question open for examination.

Upon authority both in point of respectability and numbers, it is clearly proveable that where fraud enters into the transaction, it is competent for the defendant upon proof of it, to shew a defect in the consideration in diminution of damages. This qualified admission of the defence, originated from the rule, that fraud avoids a contract *ab initio*. In point of justice I can discover no sufficient reason for permitting the defence to be set up, where there is a fraud in

the transaction, and denying it where there is a false warranty unaccompanied by a fraud. In either case it is the duty of the jury to graduate the plaintiff's recovery by the injury which the defendant has sustained: for the old Common Law notion that fraud so vitiated every contract which partook of it, as not to allow of a recovery, though it but partially impaired the benefit which the defendant expected to derive, has been exploded—more recent authority only allowing it to go in reduction of damages. The cases of *Poulton vs. Lattimore*, *Miller vs. Smith*, *Germaine vs. Burton*, and others which are cited, are cases in which the defendant had the plaintiff's warranty.\* Yet this circumstance is not considered by the Courts which decided them as interposing an obstacle to the defence.

\*Chit. Con.  
134.

I very readily acknowledge that I have examined this case under circumstances somewhat embarrassing. My earlier impressions of law were adverse to an allowance of the defence, unless a fraud was proven. But I entered upon its examination with a solicitude to learn in what manner it had been heretofore adjusted; and not with any particular desire to sustain my own opinion. The result is a conviction that the defence is not inhibited by the weight of authority. Under this impression I have consulted principle with a view to learn whether it afforded a barrier. My reflections have suggested none. Believing therefore that the greater benefit would result from its toleration, we are of opinion, that wherever a defendant can maintain a cross action for damages on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract, he may in defence to an ac-



tion upon his note, made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained. When real estate is the consideration the law perhaps is different, and a partial defect in title, so long as the contract is unrescinded, could not be alleged as a defence to an action for the purchase money, and this difference is to be attributed to the extensive jurisdiction exercised by chancery over the title to real estate, by causing it to be perfected; and to the additional cause, that the vendee sustains no injury by a defect of title so long as he retains the possession.—*Christian vs. Scott*.<sup>a</sup>

<sup>a</sup> 1 Stew'ts  
Rep. 490—  
2 Wheat.  
Rep. 13.

The bill of exceptions in this case does not disclose any part of the testimony given on the trial, and the first inclination of my mind was that because of this omission we could not know that the portion of the opinion of the Court excepted to, was elicited by the evidence. But further reflection has convinced me that the true rule upon this point, is this—where an exception is taken for a refusal to instruct, the bill must embrace so much of the evidence as to shew that the instructions asked for, arose out of the cause: but where instructions actually given are excepted to as mistaking the law, no part of the testimony need be stated, to authorise the appellate Court to revise the case upon the bill of exceptions: and this distinction is founded upon the presumption that whatever is done in a Court of Justice will be presumed to be legally done, until the contrary appears—*Vas-<sup>b</sup>se vs. Smith*,<sup>b</sup>—*Pennock, et. al. vs. Dialogue*.<sup>c</sup> Had the Judge merely refused the instructions asked, we could not have revised the legal question; but he has gone farther and stated his opinion upon the law to

<sup>b</sup> 6 Cranch,  
226.  
<sup>c</sup> 2 Peters',  
15.

the jury. In this we are of opinion he has erred, and are therefore in favor of reversing the judgment and remanding the cause.

This case presents other questions of law, but as the one already considered, is decisive of it, we decline examining them.

SAFFOLD, J.—The highly important doctrine of partial failure of consideration of contracts involved in this case; and under what circumstances it is available as a defence at law, have often produced difficulty and embarrassment in the Judicial department of the several States of the Union, as well as in Europe.

Not being prepared to concur in all the views stated in the Opinion just delivered by my brother *Collier*, it is sufficient to declare my concurrence in the judgment. By this course circuitry of actions and increased litigation are often avoided, and justice obtained, when it would otherwise be beyond the reach of the party aggrieved.

Having for many years held the same principles in which I now concur, instead of entering anew into an investigation of the doctrine, I refer to the Opinion of this Court, delivered a year ago, in the case of *McMillion vs. Pigg and Marr*,<sup>3</sup> for an exposition of the views and authorities on which my opinion is founded. The authorities there reviewed tend strongly to the same conclusion.

<sup>3</sup> Stew't.  
Rep. 165.

PERRY, J. not sitting.

SHAW *versus* BOYD.

A mere verbal promise to pay a squatter for his improvements on public land, not made at the request of promisor; will not sustain an action.

A consideration wholly past and executed will not sustain a promise, unless the consideration arose at the instance of the party promising.

This action was brought by Boyd, before a Justice of the Peace of Pike county, to recover of Shaw the value of certain improvements on public land. There was a judgment for the plaintiff, and an appeal was taken to the Circuit Court. The bill of exceptions disclosed, that on the trial in the Circuit Court, the plaintiff offered parol testimony to prove that the defendant had agreed with, and had promised to pay, him for certain improvements on public land, the reasonableness of which was to be left to arbitration: no evidence was produced, that any arbitration had been effected; or that the promise was in writing. The defendant moved the Court to instruct the jury, that the promise, not being reduced to writing, was void under the statute of frauds: but not so the Court, which charged, that if the improvements had been of value to the defendant, and he had promised to pay for them, after he purchased the land from government, he was bound to pay for them. On this charge, the jury gave a verdict to the plaintiff, and by writ of error the defendant moved the cause into this Court.

*Goldthwaite*, for plaintiff, contended, that in this contract, nothing was passing, or to be done, at the time of its execution: it was upon a past consideration, and therefore not obligatory. There was no

right in the plaintiff: the defendant could have availed himself of all the privileges possessed by the other: he could have bid for the land; and the promise was void on the principle of its being as for *hush money*, and against public policy.

Plaintiff could do no act which would have assisted the defendant in buying the land, except by refusing to bid, which would have been illegal; because government would have been defrauded. Past consideration does not support a promise.—*Kent's Com.* 265—7 *Johns.* 87.

The promise was within the statute of frauds: it attempted to convey an *interest* in lands; and so being in parol, was void.—*Roberts on Frauds*, 127.

*Thorington, contra*—The improvements in this case, if not made with *assent* of government, were at least made without *dissent*. They were of value to defendant; and being of value, certainly created a consideration.—7 *Coven*, 92. As to argument upon statute of frauds—See 11 *Johns.* 145.

Here plaintiff had *possession*: it would have been protected by *forcible entry and detainer* proceedings, and could therefore be sold.

TAYLOR, J.—There is some difficulty in this case, in ascertaining what the evidence was, which was intended to be stated in the bill of exceptions; but by examining the charge of the Judge, we can probably arrive at a correct conclusion on this subject. From that charge, applied to the evidence as stated, I infer that the land upon which the defendant in this Court had made his improvement, was about to be sold by the United States, and the plaintiff intended to pur-

chase it, and that before this sale he promised the defendant he would pay him a reasonable sum for his improvements, which should be determined on by arbitrators: that after the land was sold, and he had become the purchaser, he again promised the defendant that he would pay him for the improvement.

The counsel for the defendant insists, that the correct construction of the proof, as it appears on the record, is, that the promise of payment was made in consideration of the defendant's delivering possession of the premises to the plaintiff: that the declaration avers such to have been the consideration, and the evidence must have been intended to sustain the averments of the declaration. We certainly cannot examine the declaration to arrive at a conclusion with regard to the proof, and a fact so important as the delivery of possession of the improvements, if proved, could not have been overlooked by the Judge, when he was requested to charge the jury, that no consideration for the promise sued on had been given in evidence.

The charge, excepted to, is in the following words: "that if the jury believed that the defendant (below, plaintiff here) did, after purchase from the United States, promise that he would pay plaintiff for the improvements so made before his purchase from the United States, and that those improvements were of advantage to the defendant, that the same was a valid undertaking and a sufficient consideration."

The authorities concur in sustaining the doctrine, that if a consideration be wholly past and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or *request* of the party promising; and that request must have

\*3Kent 365  
7Johns. R.  
87.

been expressly made, or necessarily implied from the moral obligation under which the party was placed.\* It is not pretended here that any such request was proved, nor can it possibly be implied from the nature of things. The plaintiff had never held any interest in the land before the improvement was made: it constituted a part of the public domain.

The judgment must be reversed and the cause remanded.

SAFFOLD, J. not sitting.

CRAIG, et. al. versus ATWOOD.

1st 86  
184 887

Where an action is brought against several defendants in a Justices' Court, one of them without the concurrence of the balance, may prosecute an appeal.

In error from the County Court of Marengo.

In this case Atwood had obtained thirteen judgments against Craig, and others, his sureties to a bond as constable. A *certiorari* was prosecuted by Craig and one of his sureties, to the County Court, which on hearing was dismissed, on the ground that all the defendants had not joined in the appeal. Exception was taken to this decision of the Court, and the same assigned for error here.

*Lyon for Plaintiff—Stewart, contra.*

PERRY, J.—It appears by the record in this cause, as disclosed in the petition of Craig for writs of *certiorari* and *supersedeas*, that Atwood had recovered thirteen judgments against him, James H. Adams, John C. McGrew, William Anderson and John Lockart, his securities to his bond as constable. The Judge of the County Court granted the petition for writs of *certiorari* and *supersedeas* ; and ordered the clerk of his Court to issue the same upon Craig's entering in-to bond with security in double the amount of each judgment before the magistrate (which amount was stated in the petition:) the writs of *certiorari* and *supersedeas* issued, and the cases were returned into the County Court; and at September term of said Court, 1829, on motion of Atwood, all the cases were dismissed.

A bill of exceptions was taken to the opinion of the Court, which discloses that a bond in due form and in proper penalty, was executed by Craig and Adams, two of the defendants, before the magistrate, with security, which was approved by the clerk. That the motion to dismiss was sustained upon the ground, that whenever judgment was rendered by a magistrate against more than one defendant, that no appeal could be taken by any one person aggrieved by such judgment, unless all his co-defendants join in the appeal bond.

There are several assignments of error, all of which may be embraced in the solitary proposition—did the Court below err in dismissing this cause because all the parties defendant to the judgment before the magistrate, did not execute or join in the bond for prosecuting the *certiorari*.

In deciding this question I believe it will only be

2 Toul.D. necessary to refer to the act of the Legislature, passed in 1814.. The language of which, is so clear and free from doubt as to what the law makers meant, that an attempt to place a meaning different from that which the statute itself evidences, would be a task not easily accomplished. The language of the statute is this: "that any person aggrieved by the judgment of any justice of the *quorum*, or of the peace, may within five days thereafter, appeal," &c. Now, if *any person aggrieved* has the right to have that grievance redressed, he would be deprived of that right if a co-defendant should refuse to join with him in the appeal, and thereby defeat what the legislature has made ample provision for, and fasten an unjust judgment in many instances upon one of several defendants. This could not be consonant to reason and to justice. Hence I conclude that one of several defendants has the right to appeal and execute a bond independent of his co-defendants, and by that means remove the proceedings from the justice's jurisdiction into a higher tribunal.

The judgment must therefore be reversed and the cause remanded.



CASS *versus* NORTHROP.

Where an endorsed note is relied on as an offset, such endorsement must be proved.

The statute of 1819, exempting plaintiffs, in suits on assigned paper, from proof of the assignment, unless defendant makes affidavit that it is forged; is not applicable to cases, where an endorsed paper is produced as a set off.

In error from Montgomery Circuit Court.

This action was debt, brought to recover the amount of a judgment obtained in the State of Georgia, and also the amount of a promissory note. The defendant plead *nul teil record*, and *off-set*. On the trial of the cause the defendant produced as a set off, notes of hand executed by the plaintiff to one Hoffman or order, which the plaintiff moved to exclude from the jury, on the ground, that the indorsement was not proven. The Court overruled the objection so made by the plaintiff, and there was a verdict for the defendant.

To the opinion of the Court, on this point the plaintiff filed his exception, which brought the case to this Court for revision.

*Goldthwaite*, for Plaintiff.

The only point to be considered of here, is, if an offset is introduced against the original payee of a note, must the indorsement be proved?

Under our statute, or by the Common Law where notes are before a jury without proof, a set off is a debt that must be proved. But this case does not come within the statute of 1819. The statute applies only to defendants, and not to plaintiff's.<sup>a</sup> At

<sup>a</sup>Toul. Dig. 160.

<sup>b</sup>Aik. Dig. 283, § 143.

Common Law the plaintiff was bound to prove the fact of signing the note. Is it not Common Law the same where the defendant seeks to establish a debt against the plaintiff? An indorsement must be shewn, and therefore proved. Suppose the defendant finds a note of the plaintiff, and produces it as off-set—he can prove the hand-writing of the note, but he cannot the indorsement. Now must the plaintiff prove that he did not assign, or must the defendant shew his right to the off-set? Without the statute, assignment must be proved as any other fact. The only point is then, is the case within the equity of the statute. It says “when any *suit* shall be instituted :” “suit” is used. Here no suit is brought by the defendant. It says “defendant” shall deny : this is not plaintiff. If the note must be proved why not the assignment also? It depends on the same principle. There must be 1st a liability in the defendant, 2nd a title in the plaintiff. Both must be shewn by any one seeking to assert a right in a court of law against another. Here the party shows a liability but, no right.

In many instances a note may come improperly into a man’s possession. Suppose another claim on the same note? Would this record be good evidence? The other might prove it a forgery.

*Thorington*, contra.

A set-off is precisely and exactly a cross action, and must be determined on the same ground. Both parties are in Court, one comes in by writ, and the other by plea. The statute requires a denial, as being of the more convenient practice. The possession of the note, and the indorsement on it, are sufficient *prima*

*facie* evidence. The statute was not made for the sole benefit of the plaintiff, and the probabilities are against the forgery of indorsements.

*Goldthwaite*, in reply.—How could we disprove the indorsement? Assignor might be dead; but the great injury here, would result to the foreign suitor. Craving oyer might be avoided by alleging it was lost, and the party is called upon to prove a negative. A paper is produced and read to the jury—it is impossible to rebut it. Suppose many witnesses called to prove that the indorsement is not in the hand writing of the assignor—it is rejected, because if within the statute, it must be denied by the party on oath.

In *assumpsit*, on general issue, plaintiff is called upon to prove that issue, and it is as well his own title, as defendant's liability. The plaintiff avers both and must prove both.

COLLIER, J.—On the trial in the Circuit Court, the defendant pleaded as a set-off, several notes made by the plaintiff, of which he claimed to be the proprietor or assignee. He proved the plaintiff's signature, but failed to prove the assignment. The presiding Judge permitted them to go in evidence without such proof; whereupon, the plaintiff excepted, and the only question for revision, arises out of this exception.

The 37th section of "an act to regulate the proceedings in the Courts of Law and Equity in this State" passed Dec. 14, 1819,\* enacts, that where any <sup>Toul. Dig 189.</sup> suit shall be instituted on an assigned bond, the plaintiff shall not be put upon proof of the assignment or assignments, unless the defendant shall annex to his plea an affidavit, or make oath in open Court

that he verily believes that some one or more of such assignments are forged." This provision is applicable alone to defendants, and there are certainly reasons why it should not be extended in its operation to plaintiffs. The case supposed in argument, of the plea of an assigned bond as a set-off, where a non-resident plaintiff is suing, offers a strong reason against its extension. The absence of the plaintiff from the State would render it extremely difficult and inconvenient to meet such a plea by a denial of the assignments, if an oath was required. The situation of the defendant is very different—he is present and can lend his aid so far as necessary to his defence.

We do not feel ourselves called on to enter so extensively into the consideration of this case, as if it were entirely *res integra*. This Court in *Parkes & Burke vs. Greening*,<sup>Minor's R. 178.</sup> have determined that the statute which requires a plea of *non est factum* to be verified by affidavit, applying in terms to defendants, will not be extended by construction to plaintiffs, and that they may be permitted to reply *non est factum* without oath. This decision is considered as conclusive, in principle, of the case before us.

With regard to the question, whether the possession of the notes by the defendant was presumptive evidence that they were assigned to him, it need only be remarked that at common law, that circumstance did not dispense with proof of the assignment.

Let the judgment be reversed, and the cause remanded.

TAYLOR, J.—The single question in this case is, whether or not, if an assigned note be pleaded as an

off-set by an assignee, it devolves upon him to prove the assignment when it has not been denied upon oath. 'This question involves the construction of the 37th section of the act of 1819, entitled "an act to regulate the proceedings in the Courts of Law and Equity in this State;" which section is in the following words, viz: "when any suit shall be instituted, by any person or persons, as assignee or assignees of any bond or other writing, it shall not be necessary for the plaintiff or plaintiffs to prove the assignment or assignments, unless the defendant or defendants shall annex to the plea, denying such assignment or assignments, an affidavit stating that such defendant or defendants verily believe, that some one or more of such assignments was forged, or make oath to the same effect in open Court, at the time of filing such plea."

It may be well to enquire what the object of the General Assembly was in enacting this statute? Was it to favor and benefit plaintiffs only, or to remedy that which was considered a general mischief? It had been found to produce great delay and inconvenience in many instances, particularly when notes &c. were assigned at a considerable distance from the county in which the payor, &c. resided, for the assignee to be compelled to prove the assignment. Delays were produced in obtaining evidence to a fact of a more positive character, of which the possession of the instrument with the endorsement on it, constituted *prima facie* proof. It was this which induced the statute. The assignee is the holder of an instrument, which is regularly endorsed to him; it will therefore result, as the legal presumption, that it is his property, and he shall not be put upon the

proof of this fact, until that presumption is rebutted by the oath of the maker.

Now I would ask if this is not as much the situation of the holder when he fills the character of defendant, as of plaintiff? When an assigned note is produced by the defendant as an off-set, does not the possession of an endorsement on the instrument equally prove the right to be in the defendant, as the same circumstances would, that it was in the plaintiff; and may it not be equally inconvenient from distance, &c. for the defendant to prove the assignment, that it would be for the plaintiff to do it? I, therefore, conclude that this case was within the mischief intended to be remedied; but when a defendant pleads an off-set he may be considered at least as a *quasi* plaintiff, and therefore, (if the verbiage used by the General Assembly, and not the plain intention is to govern,) as coming within the words of the statute. The plaintiff files his declaration, stating a cause of action against the defendant, which by the rules of law he is bound to prove; the defendant does not deny this, but pleads, that he as assignee, holds the note of the plaintiff. No investigation of the plaintiff's demand is now necessary—that is admitted: it is admitted that he has a cause of action against the defendant which cannot be resisted, but the defendant brings forward a cause of action against him which now is the matter to be tried. The plea is in substance a declaration. Except the mere formal commencement and conclusion, it is in all respects in the style of a declaration, and the counsel has justly said that this defence is in the nature of a cross action.

The reasons which have been urged by the counsel for the plaintiff in error, against the construction

which I give to the statute, are all equally applicable to every assignee whether he be plaintiff or defendant, and the former decisions of this Court, by which the person using a note as a set-off, is required to shew that the interest was in him at the institution of the action, prevents all danger of injury to the plaintiff even to the amount of the costs.

The decision of this case in favor of the plaintiff in error, would have the effect of settling the construction of the 3d section of the act of 1811, entitled "an act regulating judicial proceedings in certain cases, and for other purposes, in a manner to which I could never agree. By that section it is enacted, "that whenever any suit shall be commenced in any of the courts of this territory, having jurisdiction thereof, founded on any writing, whether the same be under seal or not, the Court before whom the same is depending shall receive such writing as evidence of the debt or duty for which it was given; and it shall not be lawful for the defendant or defendants in any such suit to deny the execution of such writing, unless it be by plea, supported by the affidavit of the party putting in such plea."

In the section last cited, the same terms are used to convey the meaning of the General Assembly which we find in the clause under consideration; and it does appear to me that to exclude defendants pleading a set-off from the benefit of this section would be introducing a confusion in the practice of our Courts which ought not to be tolerated.

The case of *Parks & Burke vs. Greening*, has been relied upon by the plaintiff in error. In that case a construction is given to the 33d section of the

act of 1807, entitled "an act establishing Superior Courts, and declaring the powers of the Territorial Judges." The section is in the following words: "The defendant in any case, may plead as many several matters as he may judge necessary to his defence: *Provided*, he be not admitted to plead and demur to the whole: *and provided also*, that no plea of *non est factum* shall be admitted to be pleaded, but when accompanied with an affidavit of its truth." The defendant pleaded a release; to which the plaintiffs replied *non est factum*; the defendant demurred to the replication, because it was not verified by the affidavit of the plaintiffs. This Court overruled the demurrer, and determined that the replication was sufficient. Admitting the correctness of that decision, I do not think it should have an influence in this case. The change of the Common Law in the mode of pleading *non est factum*, is made by a *proviso*. To ascertain the intention of the General Assembly, and give a correct construction to the *proviso*, we must look to the other parts of the section, as a *proviso* is usually a restriction upon, or explanation of the enactment which precedes it. In this instance the enactment was intended to extend an additional privilege to defendants, viz: that of filing a multiplicity of pleas: this privilege, however, by the *provisos*, is to be exercised under certain restrictions. First, the defendant is not to plead and demur to the whole: second, when he files the plea of *non est factum*, he he must make affidavit of its truth.

An additional duty is imposed upon defendants, and one which is righteous in itself, by way of equivalent, as it were, for the great benefit afforded to them. And this appears to be the view taken of the



statute by the Court in the case of *Parks & Burke vs. Græning*. They say "the previous part of the section authorises the *defendant* to plead as many several matters as he may judge necessary, &c. If the intention of the Legislature is to be collected from the whole section taken together, they intended to include defendants only, and extend to them the privilege of pleading several pleas—a privilege unknown to the Common Law. But this privilege is under the restrictions contained in the two *provisos* in the concluding part of the section. That these *provisos* relate to the preceding part, and depend on it for their true import and meaning, there is no doubt." It is true that the Court proceeded to strengthen the opinion by dwelling upon the word "*defendant*," as used in the section; but the part of the Opinion which has been recited, is of itself sufficient to sustain the decision. But in the case at bar, it was a mischief which the statute was intended to remedy—a mischief extending alike to plaintiffs and defendants: and shall we defeat the intention of the framers of the law, when it is completely in our power to give it full effect? The act is of a highly remedial character, and every rule requires that it should receive a liberal construction.

It has been urged in argument, however, that great injury and inconvenience might result to suitors by extending the provisions of this statute to plaintiffs as well as defendants—that non-resident creditors in prosecuting suits against citizens, would be met by their notes, pleaded as offsets which had been surreptitiously obtained, or that it would become customary to plead such assigned note, and that it was lost: that in either instance, they would be un-

able to deny the assignments on oath, although by a dozen witnesses they might, if the note were exhibited, be able to disprove them. Were this to be apprehended, it would have no effect on my decision. Our laws were made for the benefit of our own citizens, and a casual inconvenience to others is not to restrict their operation. But these inconveniences are all ideal. It cannot happen that the notes of plaintiffs will be so often exposed to the cupidity of defendants, particularly when the parties reside in different States, as to authorise such an apprehension to weigh to the amount of a feather. A non-resident will have his agent here, when he is suing for his debt, and if a dozen men, or one man, can disprove an assignment on a note pleaded against him as an offset, the agent could honestly take the oath required by the statute. As to pleading a lost assigned note, I can perceive no difference whether the lost note be assigned or not; and when it is recollected that the defendant is bound to prove that the note was his property, before the suit was instituted against him, to enable him to use it as an offset; all these difficulties will vanish at once.

It is my opinion that the judgment should be affirmed.

HARDWICK *vs.* ROBINSON & WIFE.HARDWICK *versus* ROBINSON & WIFE.

Where A paid to B a sum of money to be vested in personal property for the use of B's child, and B, instead of purchasing property, set apart a portion of his own, with the consent and approbation of A; B considered as the Trustee of his child, and the possession deemed good, so as to vest in the child a title against either A or B's subsequent acts.

This was an action of trover, in Blount Circuit Court, to recover the value of a slave, brought by Robinson & wife, against Mary Hardwick, the wife of George Hardwick, deceased. Nancy Barron, the sister of Hardwick, had deposited with him five hundred dollars, to be placed at interest; or to purchase a negro, for the use of his daughter Kesiah, now the wife of Cornelius Robinson. Afterwards, on Hardwick saying that he had no money with which to effect the purposes of the trust, it was agreed that a slave named Peggy, now in contest, should, in consideration of the money received by him, be given to his daughter. Hardwick, in pursuance of his agreement, made a formal delivery of the slave to his daughter, and held her in possession twelve or fifteen years, and until he died. Mary Hardwick retaining the possession of the slave, the present action was brought for her recovery. On the above facts, the Court charged the jury, that if they believed Nancy Barron paid to Hardwick a valuable consideration for the slave, for the use of the plaintiff's wife, that the purchase vested the right of possession in her, and that the right of property followed the purchase. On this charge of the Court, there was a verdict for the plaintiffs, and the same being excepted to, was assigned as error.

SAFFOLD, J.—This action was trover, brought in the Circuit Court, by the defendants, in error, against the present plaintiff, to recover the value of a negro woman and her child, in which plaintiff effected a recovery ; to reverse which this writ of error is prosecuted.

The exceptions to the sufficiency or legality of the recovery arise out of exceptions taken on the trial. From these, it appears that Nancy Barron, the sister of George Hardwick, loaned or deposited with him five hundred dollars, to be placed at interest for the use of his daughter Keziah, (who afterwards became the wife of Robinson, and is now his co-defendant in error,) or to purchase a negro for her : that in a subsequent conversation between said Nancy and George, the latter said he had not the money to place at interest, or to buy a negro, but he had one named Peggy, (now in contest,) which, if she would answer the purpose, he would give to said Keziah. George Hardwick was the husband of Mary ; he retained the possession of the negro twelve or fifteen years, until his death ; having, however, pursuant to the agreement with his sister, and soon thereafter, delivered the negro to his daughter Keziah.

This being all the testimony, the Court charged the jury, that if they believed Nancy Barron paid the deceased, (under whom the defendant claimed not as purchaser or creditor,) a valuable consideration for the negro, for the use of the plaintiff's wife, that the purchase vested the right of possession in the plaintiff, and the right of property followed the purchase.

This charge is assigned as a ground of error.

The fact of delivery of the property, was admitted

to have been proved, as expressed in the bill of exceptions. The statute of limitations was not pleaded. Nor does it appear but that the deceased retained the negro, subsequent to the agreement, virtually as trustee of his daughter; and if that were material, it is fair to presume she was a minor, and continued to reside with him during all or most of the time till his death. Hence there was no error in the instructions referred to.

It is further assigned for error, that the Court refused to permit the plaintiff in error, to prove the last will and testament of the deceased Hardwick, under which she claimed the negro.

The deceased having divested himself of the title by agreement, for a valuable consideration, and fully consummated, had no power afterwards to impair this right by bequest, or other declaration of his own. Admitting that the rule might be different in favor of creditors or subsequent purchasers, in this case, it is shewn, that no such right was claimed; consequently there was no error in the rejection of the will offered as evidence.

That the Court refused to permit the plaintiff in error to read as evidence the last will and testament of Nancy Barron, is also assigned as a cause of error.

The will offered, purports to have been executed and proven in the State of Georgia, and a transcript thereof was relied on as the evidence. It is unimportant to the determination of this case, whether the will and probate were legally authenticated or not: nor does this point appear to have been particularly contested. The only material question was, had Nancy Barron consummated the donation by agree-

ment with the deceased Hardwick, for the benefit of his daughter. If she had not, the defendants in error had no right of recovery. If she had, the property having been delivered, and remaining out of her possession she had no power to retract the gift, but it should have been viewed as a right vested and beyond her control. Nor is any thing shewn respecting the contents of either of the wills, from which it might appear that they would have been material, independent of the objection stated. Under this view of the case we are of opinion, that there is no error in the record, and that the judgment must be affirmed.

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BROWN *versus* HAY & GERMANY.

Under the act of 1806, regulating the grant of administration, to the next of kin if there be no widow; the father is entitled to the administration, in preference to the sisters or brothers of the intestate.

In this case, the plaintiff in error, together with the defendants, applied to the County Court of Montgomery county, for letters of administration on the estate of James Brown. Brown had died intestate, leaving neither widow, or child. Hay & Germany were the husbands of two of the sisters of Brown, and the plaintiff was the father. The County Court granted the administration to the defendants in right of their wives, to the exclusion of the father, who took an appeal to the Circuit Court. The Circuit Court affirmed the decision of the County Court, and the

plaintiff on that affirmation took a writ of error, which brought the case here for revision.

*Goldthwaite*, for Plaintiff.—This depends on the statute of 1806—*Toul. Dig.* 324. The question is, who is entitled to the administration. We must advert to the English rules for the principles of descent of real estate. The descent as to real estates is by the Common Law; but personal estates descend as at Civil Law in the Spiritual Courts. Our statute is precisely the same as the English law, so far as the personal estate is concerned, and the same rules must govern. Then who is next of kin? That must be determined by the rules of the Civil Law, for it is so fixed in the 15th section of the statute. By the rules of the Common Law, the parties would, in this case, stand in precisely the same degree; but by the Civil Law they stand in different degree. The father is first, and brother second at Civil Law, because nearest to *propositus*.—2 *Bl. Com.* 504. The words of the English statute and of our own, are exactly similar—so the rules of construction. The rule is distinctly laid down in *Blackstone*, and can not be questioned, so far as relates to administration. In 1 *Peere Wms.* 40, 41, will be found an analagous case, similar in principles to this.

In England, the father takes all the estate to the exclusion of brothers and sisters: in this country it is the reverse. Now although the Legislature has changed the right of descent, they have not the right of administration. Whether casually or not—can this Court now go farther than the Legislature has gone? Has it power to divest a right not divested by the law?

The right to distribution does not govern the right of administration—for if one followed the other, the law would give it to *all* distributees in the same grade; but it gives the Court a right to select one out of them, and to defeat others of equal grade.

The same doctrine is found in 1 *Salk*. 38.

The statute does not proceed on the right to distribution, for in some cases a creditor becomes entitled to the administration: also a widow before all. The statute gives the right to the widow, when she would be entitled only to one-third, and the child to two-thirds: therefore, the Legislature never intended that the right to administer should follow the greatest interest. Another rule is in fact laid down—Administration is given to those first, who, from affection, would most likely take care of the estate. After them, it is given to those most interested. Now who is most likely from affection to take care of the estate? the father or the brother. The one is father to all; and brothers may disagree. The statute thus gives the right to the widow before the brothers. From her affection, she is the most interested in the preservation of the property—and so the father. Under this rule, the grand-father takes the right before the uncle or aunt.

LIPSCOMBE, C. J.—James Brown died intestate, leaving no wife or child; but left two sisters, the wives of the present defendants, and his father Allen Brown, the plaintiff. The Judge of the County Court granted administration to the defendants in right of their wives, in exclusion of the father. The father appealed to the Circuit Court, where the order of appointment, made by the Judge of the County



Court, was affirmed, from which judgment the case is brought into this Court by a writ of error. The question to be decided is one of construction, arising on the act of the Mississippi Territory of 1806, in force in this State.\* By the 20th section of this act, <sup>Toul. Dig. 324.</sup> the administration is given to the widow, if there be one; if not, then to the *next of kin*, or some of them. The question turns mainly on what is meant by the next of kin: whether the degree is to be ascertained by resorting to the Canon or Civil Law rules. If the computation of the degrees of propinquity is to be made according to the Canon Law, then the father and his daughters would stand in an equal degree, each being one remove from the deceased, the *terminus a quo* of computation. But according to the Civil Law the father, as the common ancestor of the deceased, and his surviving sisters, would be the *propositus* in the genealogical table, and each remove in the ascending and descending line would count a degree. Thus the ascent of the sisters to Allen Brown, the plaintiff, and common ancestor, is one degree: the descent from him to a level with the deceased brother, would be another degree, whereas the ascent from the deceased to the father who claims the administration, is but one degree.<sup>b</sup> It is at the discretion of the Judge of the County Court, to make a se- <sup>2 Blacks. Com: 324, 504.</sup> tion from those in equal degrees, if there is no widow, or she is from any cause passed; and the selection of the husbands of the sisters to the exclusion of the father, would be no ground of reversal, if their rights were equal, as they would be if the Canon Law rule of computing propinquity is the one contemplated by the act of 1806. But if the Civil Law rule is the correct one, then the father's right is superior

to his daughter's. In giving a construction to the meaning of next of kin as used in the act of 1806, if we were left in any degree of uncertainty as to which should be adopted, the Civil or Canon Law meaning of the term, there would be some reason in setting the question in favor of the Canon Law, as that rule would in this instance throw the administration on the persons entitled to the property of the deceased under our statute of descents. This reason would not always hold good, because not unfrequently the persons entitled to the property would not be in a situation from infancy or from some other cause, to take on themselves the administration, and in such cases there could perhaps be no safer depository of the trust, than with the common ancestor. But the 16th section of the same act of 1806, directs that in ascertaining the next of kin, it shall be according to the rule of the Civil Law.

<sup>886.</sup> *Toul. Dig.*

The Legislature then having explained in what manner the next of kin shall be computed in the 16th section, although that section relates to descents, we are bound to infer that the 20th, and all other subsequent sections, wherever the same term occurs, should be subjected to the same rule.

We are therefore brought to the conclusion, that the father's right to the administration should have been preferred to the sisters', and that the judgments of the County and Circuit Courts must be reversed.

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SMITH vs. PETTUS et al.

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SMITH *versus* PETTUS, et al.

It is competent for Courts of Chancery to relieve a purchaser of real estate from payment of the purchase money, where the vendor cannot effect a title.

The inability of a vendor, through insolvency, to make titles to real estate sold by him, is a sufficient ground for the interposition of equity to prevent such vendor from enforcing the payment of the purchase money, until such disability is removed.

And where a note has been given by the vendee for the purchase money, equity will interpose against its recovery, even in the hands of an assignee, if the equitable defence would have availed against the payee.

The purchaser of real estate, has the right to discharge liens, and remove disabilities upon such estate, in order to obtain and perfect a title to himself.

This was a bill in Chancery, filed in Lawrence Circuit Court, to enjoin a judgment at law. The bill showed, that in 1819, the complainant purchased of William Pettus, a part of two lots of land, lying in the town of Courtland, in Lawrence county; that said Pettus, being indebted to the Commissioners of that town, for the said and other lots, it was agreed, that complainant should pay to them the sum of twenty three hundred and sixty-six dollars, and sixty-six cents, (the amount contracted to be paid.) A majority of the commissioners not being present to carry the arrangement into effect, the complainant executed to Pettus his notes for the said amount, payable in three instalments; that Pettus was to retain said notes until the Commissioners could meet, and in the meantime to execute a bond for titles; that subsequently, complainant received possession of the lots, and that Pettus' bond for titles, had been lost. The bill alleged that afterwards, complainant gave notice to Pettus of his readiness to complete the contract and to take up the notes of Pettus in the hands

of said Commissioners; but that Pettus insisted on being paid himself the amount of the first payment; that thereupon complainant applied to the Commissioners, and took up and credited Pettus's notes to the entire amount of his contract, of which Pettus had then notice; that Pettus, in violation of his agreement, assigned one of complainant's notes to one Anderson, who obtained a judgment at law on the same, against complainant; and that Pettus had left the State and was insolvent. To enjoin this judgment the bill was filed.

The answer of Anderson alleged, that he received the note in good faith, and without notice that any defence would be set up to its recovery, and relied on his judgment at law.

The Commissioners in their answer, admitted the insolvency of Pettus, and that complainant had taken up the notes of Pettus, as charged in the bill.

The complainant afterwards filed a supplemental bill making William and Samuel Cruse defendants, charging that Pettus had assigned to them, another of his notes on which judgment had been obtained. The injunction thus prayed having been granted, the Cruses answered, and denied any knowledge of the judgment existing in their favor, or that they had any interest in it; insisting that they never purchased the note, and that their names had been used without their consent.

The evidence taken in the case, sustained the allegations of the bill; but on a final hearing it was dismissed for want of equity; and Anderson decreed the benefit of his judgment.

It was here assigned as error, that the bill was improperly dismissed.

*D. Smith*, for plaintiff—In this case it will be important to enquire, if the assignee has the same rights as the assignor.

If the note is tainted with fraud, the defence is good against the assignee. To support this position I cite 2 *Johns. C. R.* 443. The assignee of a chose in action, takes the note subject to the equity of the assignor.

The second reason against the recovery, is, that the complainant had the right to discharge the debt, and demand the title—and charge the amount to his obligation.—5 *Am. Dig.* 521. A vendor has a lien for purchase money against the purchaser, where there is notice that the terms of purchase are not complied with—See 7 *Cranch* 48, as to notice and purchaser.

In this case the party had full notice—*Welsh vs. Watkins*, 1 *Haywood's R.* 369.

. 5 *Littell's R.* 8.—In this case the relief granted was the same, as here contended for by us. There the relief sought was against the assignee.

As to the right of a purchaser of real estate to pay off claims or incumbrances against it, and charge his vendor with it, see *Sugden on Vendors* 347, 353.

It does not appear that there was any covenant against incumbrances in our case.

The party gets no benefit from his contract, and the insolvency of Pettus is the ground mainly relied on—1 *Ves. sen.* 88—5 *Am. Dig.* 101—5 *Cranch* 322—6 *Har. & Johns.* 534. Equity will make that party immediately liable, who is remotely so at law.

The commissioners are parties in this cause, and the prayer is to compel them to receive payment, and make title. Here the complainant is ultimately re-

sponsible, so equity should make him immediately so.—7 *Johns. Rep.* 358—4 *Mass. Rep.* 627. A distinction is taken on the point of extinguishing incumbrances, in *Johnson's Chancery Reports*, as to where the one having the incumbrance will never assert it: but that is not the case here. The incumbrance was not a dormant title, but a legal right. In fact it was not necessary for the parties even to resort to law.—17 *Mass. Rep.* 586.

Anderson was a purchaser with notice, and subject to the same equity with Pettus. They stand in the same condition.—1 *Munf.* 38. Notice binds, if received before conveyance is executed.

The complainant had no defence at law, as the notes fell due at different times, and there could have been no redress until all were paid. The Court will perceive, that there were a series of notes. Some were not due till after possession was obtained, by the complainant, of the land. It was different from *Christian vs. Scott*—1 *Stewart*, 490. There, there was benefit.—2 *Wheaton*, 13, is the same: but here the covenants are independent. The money was to be paid before the title was demandable—*Hayner v. Bank of Columbia*, in *Peters' Reports*, had as strong grounds of defence, as this case: but there it was held to be no defence at law.

See *Tennessee Reports*, 39—where the covenants were independent, and one party was insolvent—the other party was relieved from the effect of the independency of the covenant, on account of the other's insolvency.

In principle, there is no distinction between vendors coming into equity with bad title, where title has failed; or when it certainly will fail—and yet insist-

ing for specific performance. It is unconscientious to receive money, where there is certainly no title—1 *Tenn. Rep.* 258.

In our case it is clear Pettus had no title beneficial to us.—3 *Bibb's Rep.* 342—3 *Marsh.* 274, 469.

The principle is settled, that a vendee is not compelled to receive a bad title. Though good as for part, he is not bound to complete payment.

Any resort whatever to Pettus would be futile: his insolvency is absolute.—*Avery vs. Brownlee*—1 *Marshall*, 240.

An authority in 4 *Cranch*, 137, is especially relied on by us in this case, as it is strong, and very much in point—1 *Wheat.* 179, 195—5 *Munford*, 297, note—as to who must show the defect, or goodness of title. In 3 *Munford*, 68, will be found an authority, if it be said that party knew of the incumbrance. It is immaterial—he is still entitled to relief in equity. As to purchaser and defect of title, see 2 *Randolph*, 131, and 4 *Dessaussure's Rep.* 126.

As to relief against the purchase money in equity, and as to the extent of adverse title, see 2 *Johns. Ch. Rep.* 547, 548. If doubtful or dormant, no relief to purchaser in equity.

Here, there was no title except in the commissioners; and their title is a legal one, and one they can exert without the aid either of a Court of Law or Equity.

*Hutchison, contra.*—The argument of counsel, on the other side, has taken too wide a range. I call the attention of the Court to the bill. All authorities sustain the position, that there must be allegations in the bill to sustain the relief sought. The *gravamen*

of the bill, is the parol agreement as to the temporary arrangement. A title bond was afterwards to be given.

The bill seeks to throw Anderson in the shade. It contains no allegations to authorise any of the remedies sought, and embraced by the numerous authorities cited: authorities, good perhaps in themselves, but not embraced here. I will not reply in detail to the authorities cited, for they are inapplicable. What is truly in controversy in this cause? The main fact relied on was the parol agreement, and refusal to comply; and that Smith afterwards went and made himself responsible for the whole debt, to the commissioners. Anderson had no notice of it. What had Smith done previously? When sued, he sets up this parol agreement as a defence. The same facts were pleaded at law, as were afterwards relied on, in equity. See the special plea. Smith was fully apprised of all the facts now relied on in argument, for they are pleaded. In argument, Pettus' inability, insolvency, and absconding, are insisted upon.

This, sets up all the material parts of the former defence. The absconding occurred in 1822. Smith from the year 1819, to that time, making no effort whatever to obtain indemnity on account of Pettus' incompetency. Nothing done by Smith till sued: and even then he does not allege Pettus' inability. It is not thought of—never averred as a ground of relief. We intended making the point, that the parol agreement could not be enforced at all, either at law or in equity—that it could never be set up except through the opposite party. We would have insisted on this position in reference to this case, but the



range taken in argument, and the authorities cited, dispenses with it, and induces us to rely on another feature of the case.

Pettus's inability is relied on, and they have assumed that Anderson stands in the shoes of Pettus, as regards Smith. They insist that the assignee is entitled to all the equity, &c. We need not attempt to controvert this principle, for it affords no aid for the reversal. The question recurs, whether if any equity did arise, it was ever asserted or sought to be enforced.

The parol agreement is the only equity charged in the bill. Smith became responsible of his own accord. What course should Smith have pursued? Pettus lived in the same county with Smith. Suppose Pettus entirely insolvent, or unable to procure a title from the Commissioners?—Smith should have filed his bill, setting forth that ground. Pettus, however, is suffered to remain a long time, then this bill is set up, and the same inability of Pettus is urged.

The ground assumed in argument is not sustained by the bill, or the record. The proper averments are not made. Improper grounds are taken by the bill, till Pettus absconds. Smith assumed to pay the amount due to the company, without ever consulting Anderson. He voluntarily assumed the full amount without giving any notice whatever.

A great variety of authorities are cited, but I feel satisfied they do not apply.

So far as the transaction existed between Smith and Pettus, the case might possibly be sustained; but it cannot be done, after the note passed for a valuable consideration to Anderson as assignee. The suit was pending by Anderson against Smith.

This was surely notice of the transfer of the note. Smith must have known of Pettus's inability, and he should have filed his bill against all, so as to have the matter determined so soon as known or discovered. Now after Smith, by futile defences, has delayed the case so long, until Pettus is gone, will the Court entertain his bill for relief? particularly when so long negligent of his rights, if he possessed any—and when his bill contains no averments to sustain it? And now especially to the injury of Anderson, an innocent assignee?

*Goldthwaite*, (same side)—What equity is apparent on the face of the bill? If there is no equity, there can be no decree.

The equity shewn must be from failure of consideration, partial or total, or an existing demand, as an offset. The equity must be for one of these causes: it can be for no other. The agreement in this case was to purchase "rights" of Pettus—there was no pretence of a sale of title. But Smith alleges a parol agreement besides. This presents two features of the case. The bill alleges the parol agreement to have been the contract. No parol agreement can vary a written contract. Smith relies on a parol contract, and cannot in any way have the benefit of it. It is not the same agreement—they differ, and the written one must prevail.—*Sugden on Vendors* 92. In a note in *Sugden*, the principle is sustained in many cases in England and America. Then if there was a written contract, as appears by his own shewing, how can the party vary it? What equity, then, does arise? Smith contracts not for the title, but for Pettus's right; and there is a great distinc-

tion in this. I admit that if land was sold, to which there is no title, it is different ; but there the ground is a legal fraud, and a remedy is given. The ground must then arise either from failure of consideration, or from a valid off-set at the time of the transfer.

What are the rights an assignee acquires ? and at what time do they attach ? It never has been decided any where, that the rights against an assignee, are the same in all respects as against the assignor. Our statute extends only to cases where the off-sets exist before assignment. The party here cannot under the statute, or in any other way, go beyond the time of assignment : the right must attach and be fixed at the time of assignment. In this case the respective liabilities were fixed on the 20th of January 1820. What rights or off-sets had Smith at that time ? Had he then suffered, or could he have suffered ? Does he set out in the bill that he had any off-set or right against Pettus at that time ? No. The payment was made to the Commissioners in October 1821—twenty-one months after the action was commenced by the assignee. We must see when the rights attached.

Suppose one buys a conveyance of a right, to accrue twenty years hence, and twenty annual notes be given ; could payment ever be stopped, or negotiability be restrained, because at the end of twenty years the other party might fail ? Is there any process of law or of equity that could restrain the negotiability of the notes ? If a bill was filed in such a case, a Court of Chancery would say, you should have looked to this before. It is your contract—you stipulated for such a contingent right. How much stronger is the case, where there is an inno-

cent purchaser. Whatever rights pass at the time of assignment, are fixed and cannot be affected by any thing subsequently to happen.—9 *Johns. R.* 126. And this particularly, where it is the very thing the party has contracted for. The case I cite is very similar to the present one. Here the complainant does not shew that he ever paid any thing to Pettus. There the Court said, the covenants are independent—that it is to be presumed that when the time rolls round the party would comply with this contract; that at all events they would say *caveat emptor*. Why did he not require security? Why take his bond without additional security? The Court will say so because the party says so by his contract.

In 20 *Johns. R.* 15, there is a much stronger case than the one before us. There the deed was to be executed on first payment, and before the time, the party assigned the instrument, and became entirely unable to comply. There it was decided, that the covenants were independent. When this case is investigated, it will be found that the party could not convey—he had previously conveyed. It was apparent the title was gone. But the ground of decision was, that the time had not rolled round, and it did not appear, nor could it appear, but that at the expiration of the time limited by the contract, the party might get a title.

Here Smith could not say when the assignment was made; that at the expiration of the time Pettus would not comply. Can a bill be filed, alleging that three or four years hence a contract will not be complied with? A Court of Equity cannot make a new contract for a party—if he has made a bad contract, he must abide by it. If the ground then insisted on

here is the insolvency, it fails: it is merely a contract to perform an act in future. All the authorities on the other side rest on covenants against incumbrances. Could I not contract to pay one thousand dollars in stock at a future day? If I had no stock at this time, would the party be authorised to fly off, and demand security of me, when he never thought of it at the time of contracting? Are we restricted to contract only for what we absolutely own?

Here Smith agrees to risk Pettus for three years; and the question is, what off-set had he when the note was assigned, or what discount, or failure was there then? Nothing was then in existence to defeat the note, and it was payable before the other party was to be called upon to perform: therefore it could not fail, and Smith had agreed he would pay before he knew whether Pettus would fail or not. Suppose, as Anderson says, that after the transfer to him, he went and demanded payment? Was any defence set up—could any be set up? Was any payment then made? If payment to the Commissioners had been made, under the contract with Pettus, before the assignment to Anderson, it would have been good; but if that payment was made after notice of the assignment, it was made of the party's own wrong, and he cannot now avail himself of it. Besides, that point would have been pleadable at law, and would have been good there. We see that the case was litigated at law, and a judgment rendered against the complainant. So if the ground of defence is payment, was it not a good defence at law? If there had been any contract between Smith and Pettus, that Smith should pay to the Commissioners, and he had so paid—Smith having no notice of the

assignment—the defence would have been good. But the judgment at law concludes this matter. After delaying two years, Smith applies to chancery, and alleges his contract with Pettus. Why did he not inform Anderson, so that he might procure redress from Pettus? He who seeks equity must do equity; and if Smith has lost his recourse, he must suffer—for it was through his fault and neglect.

As to insolvency, it is not pretended that Pettus became insolvent before 1822—the contract was to be performed in 1819 or 1820. If Smith had complied in time, how could he have known of a failure? How could Anderson, while he held the note, take redress against Pettus? How can there be an off-set urged which is to happen after the time when, by his contract, a party is to pay? Smith, when he took the bond for title, knew there was an outstanding title. He took the bond payable at a future time, and relied on it for his title. If he doubted Pettus, why did he not require surety? He cannot now apply to chancery, and say he was mistaken as to Pettus's insolvency. Suppose Smith had heard that Pettus intended to transfer the note, could he have prevented him, and restrained its negotiability?

Whatever equity exists in the bill is destroyed by the answer. The same defence now relied on, was insisted on in the Court of Law; and the complainant, after trying law, now seeks equity, and that, after he has been the means of destroying Anderson's rights. Where a party has made or could have made his defence at law, no relief can be obtained in equity. A Court of Chancery cannot revise an error at law: the writ of error at law was the remedy.

The case in 2 *Jobbs. C. R.* 413, with one limita-

tion, is good; but our statute limits the defence to sets-off existing at the time of the transfer.

The complainant contends, that he could remove incumbrances. The authorities do not sustain the position—they sustain it only where a covenant *in presenti* is made against incumbrances, but not as to future incumbrances. A covenant against future incumbrances, gives no present action of covenant, nor any right to buy them, till the the time elapses. The case in 7 *Cranch* 48, does not deny this—it is merely *dicta*, and does not apply to the point in question.

We admit that Smith had full notice of outstanding title, but it is immaterial, and the knowledge is the worse for him—he should have guarded by surety.

The case from *Haywood* 367, is contrary to the law as now received. But I deny the right to go so far as there contended for. Admit, however, the case to be good law—it was a case of gross fraud, an attempt to sell that which had no existence; and the fact that the notes were not negotiable, makes it a different case. In point of turpitude there is no similarity; and another defence here raised, was not there—the right to defend at law. There was no decision in the case cited on that point, or the result would have been different.

The case from *Littell* 8, does not resemble ours. We have none of the facts on which it was decided.

The principle contended for in *Sugden* 347, does not support the other side, but it shows a position for us. The incumbrance was known to Smith—it was contingent and known to be so—yet he chose his own remedy against the contingency.

The case from *Vesey, sen.* has no application. The principle that a Court of Equity will not compel specific performance, where the title is doubtful, is admitted; but if the party had notice of defects, he can ask no relief.

The cases from 4 and 17 *Mass. R.* and from 7 *Johns. R.* 358, were actions of covenant on clauses in the deed, to secure against incumbrances, and all in *præsenti*, not in *futuro*. But suppose the covenant had been to convey at a future period, would the action have been sustainable in *præsenti*? To be sure not. A covenant to do a thing at a future day, does not operate till that day arrives.

Another point insisted on was, that the party had no defence at law, because the note sued on was one of a series. Admit this—he had none in equity either—he cannot change his contract. Could he pray a delay of twenty years from the first note due, till the last, because the party might be then insolvent?

In the case cited from 1 *Tenn. R.* 39, the *decrèe* was that an account should be taken, and that the insolvent party should have the benefit of his contract. The Court there refuses to make law for the parties. Here if the suit was by Pettus, the right to off-set would be good at law, and might be asserted in equity if insolvency accrued, no third party being concerned. The case from page 258, is not relevant—it is between the parties themselves, and was a case of abominable fraud. Here there is no fraud pretended.

So in 3 *Bibb* 342, the case was between the original parties. It was not the same question. The question would have been, if assigned, was the off-



set existing at the time of the transfer? This is the grand distinction governing the cases.

The case in 3 *Munford* is good law; but there is a marked distinction as to the case here presented. There, there was an actual existing covenant against incumbrances at the time. Again, there the assignee had notice, and there was no [or very trifling] consideration given.

The case in 2 *Johns. C. R.* 547 and 548, was under particular circumstances, and as admitted was an exception to the general rule.

Here Smith has never been disturbed from his possession, and for aught that appears, Pettus may become, or may now be able to make the title.

The right of Smith at law is gone, and he has no paramount equity to ours.

The case in *Freeman's Reports* sustains a principle for us. We say there is no fraud alleged here.

*Ormond*, in conclusion—The counsels' whole argument is founded on a wrong foundation. They consider this paper negotiable. Since our statute of 1812, there is no negotiable paper, except, perhaps, cotton receipts.

It is insisted that a party must have a good defence at the time of the assignment. I think that by a reference to the statute, it will be found otherwise. In England, when a bond is assigned, (or assigned at Common Law,) and equity is called upon to give it effect, they say the assignee takes it subject to all equitation. Our statute is precisely to that effect. It is different in England, by commercial rules, as to negotiable paper; but our statute re-enacts the Common Law, and we must take the statute for what

it is.—2 *Wash. R.* 298. There the Court say, it is a common law rule, the statute being silent, and equity will do what it should do, independent of the trammels of commercial rules. Here our paper stands by the statute, as a bond at Common Law, as to the rights of the assignee. This destroys the whole of the position taken by the other side.

All equity is to grow out of the contract, although the contingency afterwards arises. The equity is inherent in the contract, at the time it is made. All equity must spring from the foundation of the transaction, and ours derives its origin from the time of making the contract. I can imagine no case where the equity of a case does not derive its source from its origin. It is an implied condition, and attaches afterwards when the circumstances transpire. Suppose the case of a mortgage of land—what is the situation of the parties? One has a legal title, and one the equity of redemption. Suppose the mortgaged assigned—the assignee takes it subject to the equity of redemption. It must happen afterwards: it is burthened with the germ of that equity which might or might not arise.—2 *Johnson's C. R.* 443.

It has been said that Smith's conduct is reprehensible. It is in proof that Anderson was apprised in February, 1820, of all the facts and circumstances now insisted on. Then Anderson had a right of redress against Pettus: so it would apply, to say, that he lost by delay of Smith. Anderson could have demanded payment of Smith, and then sued Pettus: he could have collected the amount, because Pettus was then solvent. He had then a remedy which we had not. The answer shews that he could have then recovered of Pettus—and how can he then complain of neglect and delay in us?

The case of *Stockton vs. Cook*, 3 *Munford*, is directly in point—Cook there occupies precisely the position that Anderson does here. Our knowledge, that Pettus had no title, is immaterial; we had his obligation for title—it was that we bought. We say we had no defence at law; we acquired the notes from the Commissioners too late to avail us as a set-off. We all agree that the parol agreement was void, but it had a bearing to shew that Pettus had a fraudulent intent. But suppose it was void, can a defence predicated on it bar a remedy in a proper forum?

The proof shews, that soon after Pettus left the country, his agent annulled the contract with the Commissioners, and thus our case is in point. It is the same to annul the contract, as to convey to some one else.

Pettus has not a power now to perfect a title—his bond is cancelled.

Smith purchased the land in order to make valuable improvements. What was he to do! The Commissioners would never have given a title until they were paid; for they had the fee. Our case is much stronger, than a case where a title was outstanding, doubtful and uncertain.

The bill is properly drawn; it shews enough and prays relief. Under this alone we are entitled to all the relief the facts warrant.

Suppose the notes not yet procured from the Commissioners: this could not vary the case. If the party wished a title, the Court would compel him to pay, before he could get one. Then he is in no worse situation than if he had not paid at all.

If it is true, that the assignor and assignee stand in the same relation, it is important to consider how

Pettus would stand. Stand how he will, Anderson must stand or fall with him.

PERRY, J.—The complainant in this suit, and who is plaintiff in error, filed his bill in the Circuit Court of Lawrence county, in which he alleges that on the — day of —, 1819, he purchased of the defendant, Pettus, lots Nos. 87 & 88, in the town of Courtland, for which he agreed to give two thousand three hundred and sixty-six dollars and sixty-six cents, which sum he was to pay to the Commissioners, the said Pettus being indebted to them for said lots. The Commissioners not being present, the arrangement could not then be made, and the complainant executed his notes payable to Pettus in three instalments. The first for seven hundred dollars, payable the 25th of December, 1819; the second for eight hundred and fifty-three dollars and thirty-three cents, payable the first of November, 1820; and the third for eight hundred and thirty-three dollars and thirty-three cents, payable the first of November, 1821—which notes Pettus was to hold until the Commissioners could be got together, and the complainant substituted in the place of Pettus as their debtor for the lots, and receive a title immediately from them. Said Pettus executed his bond to complainant to make title to said lots, which was to be cancelled when the arrangement should take place with the Commissioners, and their bond substituted for Pettus's, which bond of Pettus is lost or mislaid. The complainant received possession of said lots in December, 1819, at which time he gave Pettus notice that he was ready to take up his [Pettus's] notes executed to the Commissioners for the purchase mo-

ney of said lots, amounting to two thousand three hundred and sixty-six dollars and sixty-six cents, and to receive a bond from the Commissioners to make him a title, and to give up to him, Pettus, his bond for title. Pettus refused, and complainant refused to pay the notes, and on the 13th day of October, 1821, he applied to the Commissioners and lifted two of Pettus's bonds for one thousand and thirty dollars each, dated the 29th of October, 1818, and payable in one year, and the other, two years after date, and procured for Pettus a credit for three hundred and sixty-six dollars and sixty-six cents on another note held by the Commissioners against him, making the full amount agreed to be given by complainant for said lots, and also the full amount due by Pettus to the commissioners for said lots; that he, complainant, has made valuable improvements upon said lots: that Pettus has assigned to C. Anderson, one of the defendants, the note for seven hundred dollars, and that a judgment at law has been obtained thereon. The complainant prays an injunction of the judgment at law, and that the notes be cancelled and makes the proper parties defendants. Complainant also exhibits the notes executed by said Pettus and John P. Brodnax to William H. Whitaker and others, Commissioners of the town of Courtland, to secure the purchase money of said lots, also the receipt of the Commissioners for three hundred and six dollars and sixty-six cents, paid as before stated. The defendant, Charles Anderson, answers, that he took the note from Pettus for money which he had previously loaned to him, and without notice that there would be any objection to the payment of it; that he knew nothing of the parol agreement, and does not admit

that any such was made ; but admits that the written agreement stated in the bill of complainant was correctly made, and that the same is correctly stated in the bill. The defendant does not admit that complainant in December 1819, proposed to Pettus to substitute himself to the Commissioners as the payor for said lots, and receive their bond for title and to give up Pettus his bond for title, and that Pettus refused. The answer admits that complainant has taken up Pettus's notes to the Commissioners, and obtained a credit for him, as stated in complainant's bill. The answer also denies the insolvency of Pettus at the time the note assigned him fell due, and up to the time Pettus and his security left the country, which was in January 1822 : the answer admits that Pettus was involved, but that he paid all executions up to the time of his removal. The answer then avers that Pettus, at the time of the sale of said lots to complainant, and afterwards, and until he left this country, was the owner of stock in the Courtland Company to a considerable amount. The record of the proceedings in the Court of law shows, that the note was executed on the 17th day of July, 1819, for seven hundred dollars, payable to Pettus on the first day of November thereafter, as the first payment for lots, numbers eighty-seven and eighty-eight, in the town of Courtland, and that the said Pettus on the 29th day of January 1820, assigned the same to Anderson. The other defendants, William H. Whitaker, James Perrine, John Allen, Thomas E. Tart, and Bernard McKernan, the Commissioners of the town of Courtland, in their joint answer, state, they know nothing of the contract between complainant and Pettus ; but they admit that Pettus was the purcha-

ser of said lots Nos. 87 and 88, as stated in complainant's bill. They also admit that said Pettus has absconded from this State, and left the United States, leaving many large debts unpaid, among others said debts to the respondents for said lots. They also admit that said Pettus, and his security Brodnax for the payment of the purchase money of said lots, are insolvent. They also admit that complainant has taken up said notes of Pettus and Brodnax, and executed his notes in lieu thereof, as charged in complainant's bill. They further state that since Pettus absconded, Daniel Wright, Esq. his agent, settled with the respondents for the purchase of all the property purchased by said Pettus of the respondents in said town except said lots Nos. 87 and 88, and gave up the bond of the respondents to make to Pettus the title to the lots purchased as aforesaid, including lots Nos. 87 and 88, and exhibits the bond as a part of their answer, by which it appears that they bound themselves to make to Pettus a title in fee simple as soon as the purchase money should be paid, the last instalment of which fell due 29th October, 1821.

The complainant subsequently obtained leave and filed his supplemental bill, making William and Samuel Cruse, defendants, charging that Pettus had assigned to them one of the notes for eight hundred and thirty-three dollars and thirty-three cents, and that they had obtained a judgment at law thereon, and prayed an injunction, which was granted. The defendants, Cruses, answer and deny that they have any knowledge of the transaction. They also deny having any interest in the judgment; that they never purchased the note, and that the first intimation that they ever had of any such proceedings being in exis-

tence was, when the complainant's bill and supplement were served upon them, and that their names had been used without their consent, privity or connivance. The depositions taken in the cause prove substantially the allegations charged in the complainant's bill. On the hearing in the Court below, the bill was dismissed for the want of equity and Anderson decreed to have the benefit of his judgment at law. It is now assigned for error that the bill was improperly dismissed, which brings to the consideration of this Court the right of the complainant to the relief sought; or how far a Court of Chancery will relieve the purchaser of real estate from the payment of the purchase money, when from subsequent events the vendor becomes unable to make titles, and also the equity between the assignee of the vendor who has become unable to make titles, and the purchaser, in being relieved from the payment of a note given for the purchase money: and thirdly—how far the purchaser of real estate has a right to discharge liens upon the property, in order to obtain titles.

In considering the first proposition, the equity of the bill is involved; for if a Court of Chancery is incompetent to relieve a purchaser from the payment of money agreed to be given for land, when the vendor is unable to make titles, there is no equity in the bill, and it was properly dismissed. That Courts of Chancery will exercise jurisdiction in perfecting titles to real estate, or in case that can not be done, to relieve the purchaser from the payment of the purchase money, is abundantly established by authority.

The Supreme Court of Kentucky, in the case of <sup>3Bibb, 342</sup> *Fishback vs. Williams*,<sup>\*</sup> decided, that if a vendor is unable to convey, it is unconscionable in him to enforce



the payment of the purchase money until he is able to convey ; and that such an inability is good ground for the vendee to apply to a Court of Chancery to enjoin the vendor from enforcing payment. The same principle is recognised in *McKinney vs. Watts, et al.*<sup>b</sup> and in page 470 of the same Book, *Hamble's heirs v. Hamkson's heirs*, it is decided, that the purchaser of lands who receives a bond from the vendor to make title, he having no title, may resort, after a great lapse of time, either to Law for compensation, or to Equity for a dissolution of the contract ; the jurisdiction is concurrent.

<sup>b</sup> 3 Marshall, 274.

In *Marshall*, 240, (*Abney vs. Brownlee's adm'r.*) the Court held, that the insolvency of the purchaser was sufficient to protect the seller from his covenant to convey, and lay down the rule that a total inability to comply by the one, operated as a release of the other; and there is such a uniformity of decision in all the Books, that I deem it unnecessary to pursue them further.

That Pettus was insolvent, and unable to make titles to Smith when the bill was filed, and has ever since continued so, is a fact incontestibly established. It is also true, that by the terms of the agreement between Smith and Pettus, Pettus was not bound to convey until the purchase money was paid ; if therefore he had been possessed of the title, his withholding a conveyance would have been no excuse for a suspension of the payment by Smith. But Pettus being insolvent—having no title—he was unable to perform the agreement on his part ; he could, therefore, have no right in equity and good conscience, to insist upon the performance upon the part of Smith: his inability to convey was, therefore, a sufficient

ground for the interposition of a Court of Equity, to prevent him from enforcing the payment of the purchase money until his inability shall be removed.— So far then, as Smith's and Pettus' rights were concerned, neither the rules of law or of equity impose any obstacle in a Court of Chancery adjusting them.

I will, in the next place, consider if the transfer of the note to Anderson, given by Smith to Pettus, for the first instalment for said lots, placed Anderson in a better condition than Pettus, as regarded the equity of Smith. The ability with which this point has been argued by the counsel, for and against the defendants, has induced me to examine the question with some minuteness; and I will in the first place remark, that the defendants counsel rested his defence, with much force, upon the defendant, Anderson, being the holder of the note, which was negotiable, and that for a valuable consideration, and before the equity of Smith arose. If the proposition, out of which the argument arose, be true, that the note from Smith to Pettus, was a negotiable instrument, then Smith's equity, which arose after the paper was negotiated, would be postponed to that of Anderson, who had acquired the interest in it.

I presume it will be admitted, that the note out of which this controversy arose, so far as Anderson is concerned, is not by the Law Merchant, a negotiable paper. Have we any statute then, or legislative provision which makes it negotiable. It will be found in the *Digest*, page 67, that the Mississippi Territory, in 1807, passed an act, in the first section of which it will be found that promissory notes were made negotiable as inland bills of exchange, were, by the custom of merchants in England. By this statute, promissory notes remained negotiable until

1812, when the Legislature again legislated upon the subject. By the first section of that act,<sup>a</sup> it will be found, promissory notes with other instruments for the payment of money or any other thing, should thereafter be assigned by endorsement, and gives the assignee a right of action in his own name, and the payor the benefit of all payments, discounts and set-off, had or possessed against the same, previous to notice of the assignment. In the second section of this act, it will be found that the Legislature repealed the law making promissory notes negotiable, placing them again in the same situation as they were at Common Law, with the exception that they might be endorsed, and the assignee sue in his own name, and giving the payor the defences, mentioned in the statute. Promissory notes, therefore, have no negotiable character given to them by statute. Anderson then can not be the innocent holder of a negotiable instrument, and therefore stands in the same situation as Pettus with respect to the note, and all equitable defences that Smith might have set up against him. This was declared to be the rule of decision, by one of the ablest American jurists of his day, (Judge Haywood,) in the case of *Welch vs. Watkins & Pickett*.<sup>b</sup> In the case referred to, Watkins sold land to Welch, gave bond to make a title, and Welch executed a note to deliver a good waggon and team by such a day. Watkins endorsed the note to Pickett, and after the endorsement it was discovered that Watkins had no title to the land. Judgment was obtained upon the note, and an injunction awarded to stay the judgment at law.

<sup>a</sup> Aik. Dig.  
323

<sup>b</sup> 1 Hayw.  
Rep. 369.

In the case referred to, (as also the one under consideration,) the note was given for land to which

the vendor could not make title. The learned Judge says, "he cannot, therefore, in equity, demand payment of the money, and is not entitled to a recovery of it." The same principle is laid down in the case of *Norton vs. Ross*,<sup>a</sup> in which the negotiability of the instrument, the payment of which was sought to be enforced, was the point upon which the case turned, and involved the construction of the statute of Virginia which makes bonds &c. assignable, which is in its provisions similar to our own of 1812. The Court decided that it was not intended by the statute to abridge the rights of the obligor, or to enlarge those of the assignee, beyond that of suing in his own name. Whether or not the construction given to the statute by the Courts of Virginia be the correct one, is by the 2d section of our statute, rendered unnecessary to enquire into, inasmuch as it has declared, that promissory notes are not negotiable; the character of the instrument being fixed, ascertained the rights of the parties. It not being negotiable, the assignee took it subject to all the equity of the obligor against the obligee, although he may be the endorser for a valuable consideration and without notice.

<sup>a</sup>2 Wash.  
Rep. 298.

<sup>b</sup>3 Munf.R.  
64.

The case of *Stockton vs. Cook*,<sup>b</sup> is further illustrative of the principles above decided. The Court, in the case here referred to, places the assignee of the bond in the same situation as the assignor, as regards the equity of the payee, and that the payor is not precluded from relief in equity against his bond for the purchase money, by the circumstance that before he made the purchase he was fully apprised of incumbrances, and took the bond of the vendor to free the estate of them. This authority

furnishes an answer to the argument used by defendant's counsel, that Smith should resort to his covenant against Pettus for redress. How futile would such a suit have been against an insolvent man, even were he within the jurisdiction of our Courts. That insolvency is a substantial ground for relief in equity, I refer to the case of *Hamlin's exr's. vs. Berry*.<sup>a</sup> Tenn. R. 39. The case referred to, was one of mutual and independent covenants, and Judge *White*, (for whose opinion I have the highest respect,) decided that that could have no bearing on the case. The case of *Greenby vs. Cheevers*,<sup>b</sup> relied on by the defendant's counsel, contains no principle adverse to the relief sought by the complainant in this suit, or contrary to the authority above referred to. The case in *Johnson* was an action to recover back money paid for land, because of an existing incumbrance. The Court decided that before the plaintiff could recover, he must fix a default upon the defendant. I consider this case, then, as an authority on the side of the plaintiff. Pettus is surely in default, and will ever remain so, as far as I am enabled to judge from the testimony. He should not, therefore, derive any benefit from a contract, which he has placed out of his power to fulfil. That he has done this is abundantly proved: for his agent cancelled the agreement between him and the commissioners, and gave up their bond by which they were bound to make him titles to the lots when the purchase money was paid. If he could now force Smith to pay for the lots because their agreement was independent, I should conclude that there was nothing substantial in the name of justice.

The case relied on by the defendants in 20 *Johns.*

4 Mass. R.  
27.  
17 ib. 568.

R. 15, I have not had an opportunity of examining; but so far as I recollect the principle of decision in that case, it is this, that he who has the prior equity shall be preferred, recognising the principle in its fullest extent: if it be true, that the assignee stands in no better situation than the assignor, Smith's equity is prior to Anderson's; because Anderson's equity depends upon Pettus', and he has none by reason of his inability to perform his contract. So far then as the rights of Smith and Pettus, or Pettus' assignees, are concerned, I might here close the investigation of this cause; but the complainant seeks in his bill to have a conveyance of the lots from the commissioners of the town of Courtland, to him, upon his paying the price agreed to be given for them by Pettus, it being the same amount agreed by him to be paid to Pettus for said lots. Smith's right to remove an incumbrance in the way of a complete title, which Pettus had covenanted to make, is well sustained upon principle, and to have the amount thus paid, deducted from the price agreed to be given, is sustained by the case of *Prescott vs. Truman*,<sup>a</sup> also the case of *Sprague vs. Baker*:<sup>b</sup> his right to do this is in accordance with strict justice; for otherwise he might never be able to obtain a good title. But how far the rescission of the contract between Pettus and the commissioners, by which they received back the lots, and became again invested with a complete title, to them, affects Smith's right to have a conveyance from them on payment of the purchase money, has not been made a question, and I presume will be unnecessary to a decision of this cause, in as much as the commissioners have received Smith's notes for the purchase money and set up no resistance to the cen-

BYNUM AND SIMS *vs.* SLEDGE.

veyance provided the money is paid ; it would be unnecessary therefore to use argument or authority to compel persons to do that which they are already willing to perform. I am therefore of opinion that the decree of the Court below be reversed—and in this opinion the Court is unanimous. And this Court proceeding to render such decree as the Court below should have done. It is therefore ordered, adjudged and decreed, that the decree of the Circuit Court be reversed. It is also further ordered, that the injunction of Anderson's judgment be made perpetual, as also the judgment in favor of Cruses.—The note of Smith to Pettus, outstanding, is hereby cancelled, and declared to be void. That the commissioners of the town of Courtland make to Smith a good and sufficient title to said lots upon Smith's paying to them the purchase money. That Smith and Anderson pay jointly the costs of this suit.

BYNUM AND SIMS *versus* SLEDGE.

Where a defendant's remedy is adequate at law, but at the time of trial such remedy is not understood nor ascertained ; the jurisdiction of equity is maintainable.

In this case, Alexander Sledge filed his bill in Chancery, in Franklin Circuit Court, to enjoin a judgment at law. Sledge had executed his note to Sims for a cotton gin, which should have been made of steel plates, of good quality. On trial, the gin proved de-

ficient. Sims being informed of this, attempted to remedy the defects, but without success. Sims had assigned the note to Bynum, and the latter had recovered a judgment upon it. On the trial, as the bill alleged, the Court had instructed the jury, that if the gin was of any value to Sledge, the then defendant, the plaintiff was entitled to a verdict, as if no part of the consideration had failed. On the hearing of the bill and answer, the injunction was perpetuated.

The plaintiff now assigned for error in the decree,

1st. That the Court below erred in not dismissing the complainant's bill.

2d That the Court erred in the final decree, perpetuating the injunction.

3d. That the Court erred in not sending the case to a jury, to ascertain the value of the gin.

It appeared, that the defendant had defended the case at law, but was not permitted to shew the facts, on the ground that they would not defeat a recovery *in toto*, but only partially.

COLLIER, J.—From the bill, answer, and proofs, these facts may be gathered: that the defendant, in October, 1824, made his note to the plaintiff, Sims, for the sum of two hundred and fourteen dollars; that the consideration therefor, was the purchase of a cotton gin by the defendant of Sims, which at the time of the sale he warranted to be of a very good quality, and that the saws were made of steel plate, and that if they were not, he would take it back and furnish one of the quality stipulated; or would make it such. It further appears that the saws were not of such a quality as they were warranted to be, but were almost valueless, of which Sims had notice; and attempted



to make them such as he promised they should be, but failed, and some time after, the gin was destroyed by fire.

Bynum in his answer, states, that he ascertained from the defendant, before he became the proprietor of the note, that no objection would be made to its payment, (but of this there is no proof); whereupon he became the assignee thereof, and recovered a judgment upon it. The defendant attempted to defend himself at law, by proving the foregoing facts, but was not permitted to shew them, on the ground that they would not defeat a recovery *in toto*, but only partially diminish it.

The decree perpetually enjoins the collection of the sum of eighty-five dollars, at the cost of the defendant; and in this, it is alleged, the Court below erred.

The agreement of Sims obliged him either to make the gin, which he furnished, such as he promised it should be, or else take it back, and furnish one corresponding with the contract. The obligation upon the defendant was to advise Sims of any defect in the gin, that he might either improve it, or place another in its stead. Sims, it appears, had notice of the deficiency, and attempted to remove it, in which he failed: the defendant was not obliged to advise him that his attempt had proved abortive; but it was incumbent upon him, at his peril, to observe the result of his efforts to improve it. It is immaterial whether Sims received notice directly from the defendant, for he recognised by his acts that he had such notice as he required.

It is true that the defendants' remedy was adequate at law; yet it was not so understood at the time of the trial. The prevailing opinion both of the

bench and the bar was, that a defendant could not be heard to allege that the consideration of a contract had partially failed to an unliquidated amount. Upon the ground then, that the defence was not well ascertained at law, the jurisdiction of equity is clearly

<sup>a</sup> 2 Caines' maintainable.—*Ludlow vs. Simond*,—*Livingston vs. Cas. 1.* *Livingston*,<sup>b</sup>—*Ellis vs. Bibb*,<sup>c</sup> in this Court, at July <sup>b</sup> 4 Johns. Ch. R. 287. term, 1829. <sup>c</sup> 2 Stew. 63

If the answer of Bynum, so far as it states a promise on the part of the defendant, to pay him the note if he became the proprietor, was sustained by evidence, the defendant would have no equity as against him : but this statement is irresponsible to any allegation in the bill ; and before it can avail any thing, should be proved.—(*Lucas vs. The Darien Bank*,<sup>d</sup> de-

<sup>d</sup> 2 Stewt. decided in this Court, January Term, 1830 )

280.

The decree is affirmed, with costs.

CRENSHAW, J.—I dissent, on the ground that this Court has decided that a partial failure of consideration is available at law, and that ignorance of law does not excuse a party.

LIPSCOMB, C. J.—and WHITE, J. not sitting.

RICHARDS *versus* HAZZARD.

An issue in fact, involving a question of fraud, is proper to be determined by a jury, but where an issue in law arises; as where the validity of a deed or contract is drawn in question, it is the province of the Court to pronounce a decision, if fraud is apparent on the face of the deed or contract, or follows from the facts of the case presented.

Though a debtor in failing circumstances may by an assignment of his estate, in trust, and in good faith, prefer one creditor to another; yet, if such assignment be made without the consent of his creditors, and reserves to the debtor a portion of his property for the support of himself; and be otherwise arbitrary and unjust to the creditors generally: it will be declared fraudulent in the whole, and the favored creditor will not be allowed to avail himself of any benefit under the assignment.

An assignment made by an insolvent debtor of his estate, appropriating to himself, without the approbation of his creditors, a certain amount for his own support, is fraudulent and void.

In error from Mobile Circuit Court.

In this case John B. Hazzard, Cashier of the Tombechee Bank, had levied an attachment on the estate of Daniel Stowe, and summoned Richards as guarantishee, to answer what money, goods or effects, &c. of Stowe, he had in possession.

Richards answered, admitting that he was indebted to Stowe, but stated that before service of the garnishment, he had received notice of an assignment, made by Stowe, in trust, for his creditors; and prayed the judgment of the Court as to the validity of the assignment.

Under the deed of assignment referred to in the answer of Richards, Stowe had assigned his estate, both real and personal to James T. Franklin, in trust, for the benefit of certain creditors, reserving to himself the sum of two thousand dollars per annum for the support of himself and family, during the continuance of the trust. The deed contained a provi-

sion appropriating the residue of the estate, after complying with the above named objects, to the payment of the creditors of Stowe, generally; but Hazard, with other creditors, were unprovided for in the assignment. The Court with the consent of the parties, rendered a decision *pro forma*, and gave judgment against Richards on the garnishment, declaring the deed void in law.

To reverse this judgment three grounds of error were assigned in this Court, to wit:

1. That fraud, consisting in intention, could not be infered from the face of the deed without the intervention of a jury.
2. That the deed was not void, as being neither fraudulent in law nor fact.
- 3.. That admitting the deed to have been void as to the reservation, it was valid as to the balance.

*Goldthwaite*, for plaintiff—The question here arises, whether the Court can declare the deed void on its face, without a jury; or, in other words, if no circumstance could be shewn to sustain it. If the deed in this case is void, it must be so under the statute of frauds.—*Toul. Dig.* 244.

I contend that under a correct construction of the statute, a Court of Law, simply, is incompetent to decide a deed void. It is the intent of malice, guile, &c. which vitiates a deed, and this intent can only be ascertained by a jury. A Court cannot of itself decide or divine what the intentions of a man are, from any one act. The law in such a case might presume, but it is mere presumption, and may be rebutted. Can nothing of mistake or accident be shewn? Else why the necessity of a jury? Is it

not for this that our jury system is formed—that by them the *intentions* of a man may be ascertained and visited on his acts? This position can be explained by our criminal law. The law says, that from a fact, fraud is presumed; but is it not presumption without proof? Now I may shoot another, and malice would be presumed; but is the act not open to be rebutted? The act and the intention are two: one may exist without the other—both must concur, otherwise the act cannot be punished. So our statute. If a man does an act by a fraudulent *intent*, it is void—and suppose it to be *prima facie* void, does this forbid every proof that it is otherwise than it appears to be? If so we must abandon all research, and carry ourselves back to the times of Lord *Mansfield* as to *libels*. The Courts then interposed against the rights of juries, but those times are gone.

Here we admit the act committed, for argument sake, but deny that the Court could judge of our intent. But look to the authorities: the case of *Edwards vs. Harbin*, 2 *Term. R.* 587, was the first establishing fraud in law.

Suppose in this case the person who signed the deed had done so by mistake? Suppose he had it in his power to satisfy a jury that no possibility of fraud existed; would he be precluded from showing this, and be thus deprived of his right to be heard? Here the decision is from one single fact, unaccompanied by others. In the case above cited, the Court commented on the act *found already by a jury*, and thus the precedent has grown up from a case distinguished by peculiar circumstances.

A case in 5 *Tenn. R.* 420, is still stronger than ours. The Courts in trying those causes, had all

the circumstances before them, and did not decide, as in this case, on one single fact, growing out of the deed alone. In the last case referred to, the facts were evidently left to a jury, and both parties went into evidence of facts and circumstances. This case occurred but a few years before Edwards and Harbin—it was a case of importance, and the doctrine of fraud *per se* was not hinted at. Evidence was received, and it was combated on the proof. So, despite *Buller's* opinion in Edwards and Harbin, there never was a decision before the last case.

In the case last cited, the Court say, it was a fact to be submitted to the jury, to determine the intent of the parties.

Now take any fact bearing the most palpable presumptions, and can not it be explained away? Take the fact of *killing*, the strongest case known to the law—yet no matter under what circumstances committed, it is still the subject of explanation. We can not, in the nature of things, suppose any one fact so potent, that it cannot be met by others. Therefore we say in fraud *per se*, the intent must be proved, and in that proof we are entitled to have all circumstances heard. In what does fraud consist, if not in intention? Can not an act be fraudulent not apparently so? and can not one apparently so, be not so in fact? In law there is nothing incapable of demonstration. Fraud is always a mixed question. The jury can find from the facts and the Court must give the rule. But fraud surely can never be determined absolutely by the Court from one single fact.

The case in 4 *East*. 1, is put on the ground of intention, by the judge delivering the opinion, and

the authorities I have mentioned shew the English doctrine, except where great mercantile interests arise. Then the rule would necessarily vary, because their situation requires it, but surely in this country where no such necessity exists, the principle will not be entailed. In New-York, it is only of late that in a continued struggle with the commercial interests of that State, the Courts seem to have yielded to the position contended for against us.

5 *Cranch* 351—2 *Har. & Johns.* 292—2 *N. Hampshire Rep.* 13—3 *Marshall* 241—as to how far a Court can infer fraud. The last case is in direct opposition, and conflicts with *Edwards and Harbin*.

An absolute bill of sale on its face may show no fraud, but it is a traversable fact, and may appear in explanation—2 *Bibb* 416. There is no authority at Common Law, where fraud is by the Court presumed and established. Even on a special verdict, setting out facts, judgment can not be rendered by the Court, as for instance a special verdict of killing—the law implies murder, but would not they remand the cause to try the question of intent?—*Bramman vs. Oliver*, 2 *Stewart* 51—*Hobbs vs. Bibb*, 2 *Stewart* 54, covers the whole ground occupied in this case. It must be admitted that before the fraud can arise, facts *de hors* must be shewn in all the cases. Now none of the facts appear in the case under consideration. Here if there be enough to pay off all the creditors, no body is injured. Therefore there can be no fraud. The opinion in the last case cited, uses the strongest language in a case precisely similar to ours. The same principle is decided in *Toulmin vs. Buchanan's exr's*, 1 *Stewart* 67, also in 15 *Johns.* 571.

In New-York, the decisions have always been the

same way, until very lately. Can a difference be drawn between the case just cited, and the one before the Court, except in favor of the latter? In a still later case, in 20 *Johns*. 442, the same principle is again sustained. There the Court decided the deed void on the ground of its *proviso*; but they do not even there go the length to say it is fraudulent *per se*. They only say "it bears the badge of fraud which may be presumed by the jury."—2 *Kent's Com.* 422—5 *Conan* 449.

An authority in 2 *Pick.* 129, will be relied on by the other side: without admitting this case as law, it is a persuasive argument; but the facts are different from ours. It appeared there on the face of the deed, that the debtor was insolvent. Here it does not. Again—in that case it was contended that the deed was void, because of the amount of property conveyed. Here, it does not appear but that there may be sufficient to pay off every debt. Suppose we owe three hundred dollars, each, to three individuals, and assign one thousand dollars, reserving one hundred, would that be fraudulent?—3 *Dessaussure's R.* 4—4 *ibidem*, 300.

*Gordon, contra.*—There is a material difference between this case, and causes decided on the deed. Here, the Court determined on a case agreed. The bare deed was not presented to the Court, but the facts were agreed on, and the cause submitted for decision. If there had been any other facts of importance to the party, why did he not submit them? On cases agreed, the Court are to decide as a jury would, and to draw the same conclusions.

In the deed under consideration, it is provided, that



after paying certain creditors, there shall be a division *pari passu*, &c. It is implied that there is an insufficiency by the very terms of the deed itself.

The facts in the case are few and simple, and on them alone the Court are to decide. The party did not rely on any other facts than those agreed, and the presumption is, that any other did not exist. The question is, does the reservation in the deed, in favor of the grantor, render it void on its face. Deeds containing such reservations have invariably been discouraged. In England, the bankrupt law prohibits them. In New Jersey they are prohibited by statute. In New York there is a great current of decisions against them, and the highest tribunals have decided them to be void. In fact, all decisions on the subject both in England and in the United States, are against them.

Deeds will be rarely found to be fraudulent, on their face, and therefore, Courts search for other facts; and if both parties intended fraud, and so expressed it on the face of the deed, would the Court refuse to declare it fraudulent? The Court in such a case would have no other alternative than to declare it void. In the case cited from *Cranch*, the Court say, *if intention had appeared, they would have declared it void*. So the case of *Hobbs and Bibb*, and *Buchanan and Toulmin*.

It is said that this case should have gone to a jury. Why? It was a *case agreed*. What fact *aliunde* could Stowe have shewn to a jury? They had agreed to the only facts to be shown. Those facts show the deed; and the deed, that Stowe had assigned property, (reserving to himself two thousand dollars per annum) to favored creditors. There, it was

a contrivance to defeat and delay the balance of his creditors, and the simple question arose, was it void? Was it fraudulent? The deed shews itself to be collusive. Would any testimony, (admitting it could be produced to vary the facts agreed,) change the evident object and construction of the deed?

I admit that fraud some times consists in intention. Is it right that a debtor should hold property under his own control, and for his own benefit—Is it honest—just—proper? If not, here we have the *intention*. Supposing the preferred creditor to be willing, is he not aiding the collusion? *Kent*, in the 2d volume of his Commentaries, after reviewing all the leading authorities on this point, declares such deeds void—and there can be no difference in this respect between cases at law and in equity, only that in one case the Judge has facts, and in the other not. But in a case agreed, all the distinction is lost. In the case of *Hyslop vs. Clarke*, the Court held the deed void, because resulting back to the grantor. It was void on its face, and so adjudged.

If a deed be void in part, when made contrary to statute, it is void in the whole.

In *Murray vs. Riggs*, it was held that the deed was void only as to the reservation, and that creditors could reach the reserved part in equity; but this case was determined on its own peculiar circumstances, and has not the unanimous opinion of the Court of errors and appeals.

*Mackie vs. Carns*, 1 *Hopk.* 372, decides a case on a deed precisely similar to the one now before the Court. The deed was decided to be void, not only as to the reservation, but *in toto*.

The case in 2 *Pickering* 129, is much in point, in which it is laid down that if a defect appears on the face of a deed, it is matter of law, and it is useless to refer it to a jury. In 2 *Sergeant & Rawle*, 198, the reservation was not put in the deed, but was found by the jury, and upon that finding the Court said it made the deed void.

*Acre*, on the same side, said, that this case did not demand a laborious investigation. The sole question to be examined is, whether the deed be void or valid at law? It is new and important, and we shall test it—first, by the statute of frauds; second, by reason; and thirdly, by authority.

1. By the statute of frauds, (*Dig.* 244) it is immaterial whether there be intent to defraud or not; if it has that effect the deed is void, because it hinders and delays creditors. The case in 14 *Johns.* 458, is similar to ours, and it is cited to meet part of the argument as to the necessity of a jury when the law pronounces it void. The act shows the intent, and then it becomes a matter of law. The case in 1 *Hopkins' C. R.* 395, contains the best reasoning that can be adduced on this subject; and the Supreme Court of Virginia has determined that a deed declared void in part by statute, is void *in toto*—4 *Rand.* 301.

Let us apply the doctrine: from the statute it is to be inferred, that if its effect is to injure and defraud, the intent is immaterial. The act does effect a delay and hindrance of creditors, and it comes clearly within the statute. It is said that it does not matter how injurious the act was if it was sanctioned by an innocent intention. It is true that this is the rule in criminal law, but it cannot apply to a civil case.

There the intent is punished, but in civil cases the act is punished on account of the injury it does—not so much to deter others, as in criminal cases, but to make reparation, which can not be done in criminal cases. When the act of the Legislature demands only a fact, the Court can pronounce on that authority; but common sense tells us that the act is sufficient, and that the intention is immaterial. But the Court, even if necessary, could easily determine the intention from the record. It is only the injury of the act of which we complain, and it is immaterial what was the intention. The case from *Hopkins* was taken up to the Superior Court of errors and appeals. The decision was attacked, but it was sustained by the Court, which was composed of some of the ablest lawyers, as their opinions and reasoning will shew; and authorities have no force, unless supported by reason.—2 *Kent's Com.*

We know that here the Court are bound down by no decision, but they will look into the decisions of other Courts and authorities, as evidence only, what the law should be. This question has always been decided the same way—in fact, all the decisions produced, sustain us. 3 *Marshall* 241 does so, and also supports a different principle than the one for which it is cited. This is similar to a demurrer to evidence, and the Court will intend all that a jury could lawfully presume. What does appear from the facts? Does he not say that he conveys every thing that he has? We will not be sent to a foreign country to seek for his property out of the jurisdiction of our Courts. Our Courts will not demand it. The Courts will never suffer a party to revel in luxury and wealth, when the creditors are suffering. A jury

then would infer that it was with intent to delay creditors, and therefore this Court will now determine it likewise.

*Hitchcock*, in conclusion.

CRENSHAW, J.—In this case it appears that Daniel Stowe made an assignment of all his lands in Alabama, and of all his personal estate, to James T. Franklin, in trust, to pay certain preferred creditors in the first instance, and then the residue, if any, to pay his other creditors generally, reserving to himself the right of receiving from the trustee, during the continuance of the trust, a sum not exceeding two thousand dollars per annum, for the support of himself and family.

Some time after the making of the deed of trust, John B. Hazzard, cashier of the Tombechee Bank, levied an attachment on the estate of Stowe, and summoned Wm. S. Richards as garnishee. On the return of the attachment, Richards admitted that he was indebted to Stowe, but further stated in his answer, that before service of the garnishment he had received notice of the assignment, and that Hazzard, the plaintiff, was a creditor not provided for in the deed of trust, and that there were other creditors for whom no provisions had been made; and concluded his answer by praying judgment on the validity of the deed of trust.

By consent of parties, and *pro forma*, the Court decided that the deed was void in law, and gave judgment against Richards the garnishee. The correctness of this judgment is now called in question.

In the argument of the case, three propositions were taken and mainly relied on, in behalf of the plaintiff in error.

1. That fraud consisted in intention, and could not be inferred from the face of the deed without the intervention of a jury.

2. That the deed was not void, there being no fraud in law, or in fact.

3. That if void as to the reservation, it was good as to the balance.

As to the first proposition, whether the question of fraud is to be determined by the judge or by the jury, depends entirely upon the state of the pleadings.

If an issue in fact involving the question of fraud were joined to the country, it would according to the established practice be determined by a jury; but even on the trial of an issue in fact, it is the peculiar province of the judge to interpret and expound to the jury the legal effect of any instrument of writing offered in evidence. If the instrument offered be impeached for fraud, or if from its face it was apparently against the provisions of the statute of frauds, it would be the duty of the Court to inform the jury whether the marks and badges of fraud apparent on the face of the instrument, were, or were not of themselves sufficient to avoid the deed.

But where an issue in law is joined, and the validity of a deed or other contract, is drawn in question by the state of pleadings for fraud or other cause, it is surely the province of the Court to declare the law arising on the facts presented by the pleadings, and if the deed on its face is obviously against the sense and spirit of the statute of frauds, or is void at Common Law; or if the conclusion of fraud natural-

ly flows from the facts of the case, the Court is clearly competent, and is bound to pronounce the deed fraudulent and void. And even admitting, that intention is of the essence of fraud, when the question is involved in an issue of law, the Court is competent and may infer the fraudulent intent, either from the face of the contract or from the facts of the case, if the marks of fraud be distinct and clear. In the case of a demurrer to evidence, to the pleading, or to the declaration, or in a case agreed, I know of no other legal rule by which the Court could be governed, and any other course which the Court might pursue, would be unlawful and erroneous.

The case before us is in the nature of a case stated or agreed, and it is our duty to pronounce the law arising on the facts contained in the answer of the garnishee.

The parties have made no issue in fact for a jury to try, but have submitted the law of the case to the judgment of the Court. Had the answer of the garnishee, or any material fact, been controverted on oath, the Court would then have ordered an issue in fact, to be tried by a jury.

As to the first proposition, that fraud consists in intention, and should in all cases be tried by a jury, I would be content to stop here with what I have already said; but it is due to the talent and character of the counsel, that I give some attention to the principal authorities by them commented on, in the argument, before I leave this branch of the subject.

Of the adjudications of this Court which were cited, the first in order was that of *Gayle, et al. vs. Singleton*. In that case the only principle settled, and which can have any bearing on the question in debate,

was, "that where property is sold by an administratrix, subject to a mortgage, and bought by herself at an inadequate price, and which mortgage is afterwards determined to have lost its lien in equity, the sale will be set aside." This principle has no direct application to the question before us. In my opinion it establishes nothing in favor or against the proposition attempted to be maintained.

The next is, the case of *Toulmin vs. Buchanan's ex'rs.* The opinion pronounced in that case, so far from recognising the maxim. "that no contract or instrument of writing, is in law fraudulent and void *per se*," does in express words declare that fraud may be legally inferred from the face of the instrument, without proof *aliunde* of a fraudulent intent. It is there said, "that if a man in debt, equal to the value of his estate, make a gift of the whole of his property, the gift, in law, would be fraudulent and void, *per se*, as against creditors." The opinion fully recognizes the distinction between a fraud arising from the face of the instrument, and a fraud made out by proof *aliunde*, or in the language of some eminent Judges, the distinction between a fraud in law, and a fraud in fact.

The case of *Brannon vs. Oliver*, is to the same effect. The principle decided in that case was, "that a purchase made by an administratrix at her own sale, was not void *per se*, but was *prima facie* valid, if no unfairness appear." The entire opinion is predicated on the implied admission, that instances of fraud in law, are numerous, and intimates a determination, not to enlarge, but to restrict them within the bounds of reason and justice.

In the case of *Hobbs vs. Bibb*, the question grow-



ing out of the case presented, was whether possession of property remaining with the vendor after the sale did of itself render the sale void in law? The Court decided that it was not fraudulent and void of itself, because the fact of possession might be explained by testimony, and the presumption of fraud arising from that circumstance might be repelled, but that it was a badge which in the absence of proof would be presumptive of a fraud.

I admit that in the opinion pronounced, there is a strong leaning against the distinction between a fraud in law and a fraud in fact; yet it will be remembered that the opinion contains the reasoning of the judge who pronounced it, and not of the Court; that though the Court may concur in the result of the opinion, it is not to be understood that they adopt all the reasoning and *dicta* of the judge who gave the opinion: they adopt so much only as necessarily leads to the result. To a decision of that case, it was not necessary to destroy the distinction, or to enquire whether there was any distinction, between a fraud in fact and a fraud in law. The question to be decided was whether possession remaining with the vendor, was a fraud *per se*. Entertaining much respect for the opinion of the Chief Justice, and acknowledging that I was once inclined to the same opinion, in this particular I must now differ.

In the cases of *Murray vs. Riggs*, and *Austin vs. Bell*, reported in the 15th and 20th of *Johnson*, and so much relied on by the plaintiff in error, the principle of a legal fraud, or fraud *per se*, to be inferred from the face of the instrument, is emphatically and fully recognised.

In one of the cases, *Thompson*, Chief Justice, expressly says, "Whenever the fraud, if it exists at all, is to be collected from the deeds themselves, it then becomes a question of fraud in law."—"that no moral turpitude is attached to this species of fraud ; or, if any, it is in a much less degree than where actual fraud, or fraud in fact, is imputable to the transaction."

In the other case, Chief Justice *Spencer* says,— "That a deed which does not fairly devote the property of a person overwhelmed in debt, to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is in law fraudulent and void." The case of *Leonard vs. Jackson & Cowan*, does not maintain a contrary doctrine. But on this branch of the subject, I deem it unnecessary to pursue the authorities any further, being fully convinced that the distinction between fraud in law and in fact is well sustained by reason and authority. The remaining inquiry is, whether from the facts presented by the pleadings, and contained in the answer of the garnishee, we are warranted in declaring the deed of trust to be fraudulent and void. The consideration of this question will necessarily embrace together the second and third propositions, and which is truly an important inquiry, at least to the parties interested in the event ; and as a precedent, in some degree settling the law, it may be important to the rights of many.

If we have bestowed upon the subject much labor and reflection, we have done no more than the duties of our station required of us. The subject was worthy of the most profound consideration.

That a debtor in failing circumstances, may by assignment of his estate in trust, and made in good faith, prefer one creditor to another, is too well settled to be now disputed. And that he may, with the assent of his creditors, reserve a portion of his property to himself, is a proposition equally plain. But whether he can make such a reservation at the expense of his creditors, and without their consent, is quite a different matter.

In the 2d of *Kent's Com.* 422, the Chancellor says, "that the debtor in such an assignment cannot make a reservation at the expense of his creditors, of any part of his property or income for his own benefit, and that modern authorities have given to such reservation the decided effect of rendering fraudulent and void the whole assignment. And no favored creditor or grantee can be permitted to avail himself of any advantage over other creditors under an assignment, which by means of such a reservation, is fraudulent on its face; and that if an insolvent debtor may make sweeping dispositions of his property to select and favorite creditors, yet loaded with durable and beneficial provisions for the debtor himself, and encumbered with onerous and arbitrary conditions, it would be impossible for Courts of Justice to uphold credit, or exact the punctual performance of contracts."

The case of *Murray vs. Riggs*, reported in 15 *Johnson* 571, was in some respects denied to be law, by the decision in the case of *Austin vs. Bell*, reported in the 20th of *Johnson* 442; and in the case of *McKie vs. Cairns*, reported in the 5th of *Cowen* 548, the doctrine is now settled in accordance with the views of Chancellor *Kent*.

In that case it was decided, "that an insolvent debtor might prefer some creditors to others, but could make no assignment of any part of his property in trust for himself, and that such assignment was void not only in part but *in toto*, both in law and equity, as being a fraud on creditors, and against the provisions of a positive statute.

The weight of modern authorities is clearly on the side of Chancellor *Kent*. They have been all examined and considered, and to my mind, none of them are sufficient to impeach the law as laid down by the Chancellor and settled by the decision in 5th *Coven*.

This law is not only sustained by authority, but has reason and justice for its foundation.

It cannot comport with reason and justice, that a man, in failing circumstances and overwhelmed with debt, should be permitted to make large reservations of his property, to himself thereby diminishing the fund for the payment of his debts, without the consent of his creditors.

Such reservation must render the whole assignment fraudulent and void, as against the best policy of the law, and against the statute of frauds, being obviously made with intent to delay, hinder or defraud creditors of their just and legal actions.

To bring the case at bar, to the test of these rules and principles of law, it is fairly deducible from the answer of Richards, the garnishee, that Stowe the debtor was insolvent, because the assignment was of his whole estate, at least within the jurisdiction of this Court, and such occurrences seldom happen except in cases of men in failing or insolvent circumstances. The schedule annexed to the deed of trust, shews

that he was overwhelmed with debt, yet he has made a reservation of two thousand dollars per annum for his own benefit during the continuance of the trust, and which may continue for an indefinite period of time. It does not appear that the postponed creditors will ever receive a cent of the debtor's property, and Richards in his answer expressly states that Hazzard and other creditors were not provided for.

There is no evidence that any of the creditors except the trustee, has accepted the terms of the assignment, and Hazzard has expressed his dissent by instituting his action at law. From the whole face of the deed, the intent to hinder and delay creditors is manifest.

We are all of opinion that this is evidently the case of a man overwhelmed with debt and in failing or insolvent circumstances, making an attempt to place his property out of the pale of the law and beyond the reach of his creditors. That by reason of the reservation contained in the deed, it must be considered fraudulent and void as against the sound policy of law, and against the statute of frauds, being obviously made with intent to delay, hinder or defraud creditors of their just and legal actions.

We are unanimous in affirming the judgment of the Circuit Court.

LIPSCOMB, C. J. and SAFFOLD, J. and COLLIER, J.  
not sitting.

BAYLOR *versus* MCGREGOR & DARLING

Motions in Court to credit an execution, or enter satisfaction on judgments; must be preceded by notice to the opposite party.

Baylor moved the Circuit Court of Jefferson county, to direct the sheriff to enter a credit on an execution subsisting against the plaintiff in favor of the defendants—and further, to compel satisfaction of the judgment entered of record. No other notice was given to the parties, than an entry on the motion docket. The Court overruled the motion, and the opinion of the Judge being excepted to, was here assigned as error.

PERRY, J.—This was a motion in the Court below; to direct the sheriff to enter a credit on an execution, which had been in his hands, in favor of McGregor and Darling, against said Baylor, and a satisfaction of the judgment upon which it had issued, entered of record. No notice other than the motion made on the motion docket was ever granted to the plaintiffs in execution. A bill of exceptions was taken to the opinion of the Court overruling the motion; which judgment is now assigned as error. Without investigating the merits of the case, upon the testimony disclosed in the bill of exceptions, it will be sufficient to observe, that all proceedings in Courts of Justice are predicated upon notice, actual or implied, given to the party whose rights are to be affected by the proceeding intended to be had. The plaintiffs in execution, therefore, having no notice of

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the motion involving their interest, the Court did not err in overruling the motion, and of this opinion is a majority of the Court. The judgment is therefore affirmed.

COLLIER, J. not sitting

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WILKERSON *versus* GOLDTHWAITE.

If in entering a judgment, the Clerk omits to insert the amount recovered, the judgment may be afterwards amended, and the amount inserted *nunc pro tunc*.

On overruling a motion, to enter such judgment, whereby costs are rendered against a party, a writ of error will lie.

In this case the plaintiff in error, as administrator of George Wilkerson, deceased, moved the Circuit Court of Montgomery county, for an order to perfect a judgment rendered some time before, in favor of his intestate, against the defendant. George Wilkerson had brought his action against Goldthwaite to recover the amount of a bill of exchange. There was a demurrer to the evidence, and on that demurrer a judgment was rendered for the plaintiff. The clerk had omitted, in entering the judgment, to insert the amount recovered; and after several years had elapsed, during which executions had issued, and been returned without making the money, a notice was served on the defendant, and a motion made for an

order, *nunc pro tunc*, to perfect the judgment. The Court overruled the motion, and a judgment was given against the plaintiff, for costs. To revise this decision a writ of error was taken to this Court.

*Vandergraff*, for plaintiff.—This motion was made to amend the judgment which was imperfect. The matter in controversy had been decided by the Court below, but the same was not entered correctly. The error is a clerical misprison, and is amendable at Common Law, at any time after. This power the Court has always exercised over its own officers, and what harm could arise from it in this case? There is nothing asked to be changed. It is a mere direction to the clerk to do now, what he should have done in the first instance after the judgment of the Court was given. If there were an error in judgment in the decision, the party had a remedy on a writ of error, but this error is not of this kind: it is one made by the clerk in entering the judgment, and it may be amended after the term of the Court had elapsed, in the same manner that an amendment may be made by the sheriff. This position must always be received as correct so long as men are liable to err in the discharge of their duties

If amendment may be thus made, when then must this application be made to amend? At any time after, provided it is done before the legal presumption would create a presumption of payment, which is twenty years; for the record would show a subsisting debt of record. That is the time to which it should be limited, and that only.

Though this application was made five years after the judgment was given, it is still in time, because



the record shows the debt as well now as then. The presumption in law is the same now that it was five years ago, yet he can not now issue an execution to collect his debt. The reason, is not a presumption that the debt is satisfied, but only a clerical defect—5 *Stanton* 557. In 1 *Strange*, 139, the doctrine is fully settled. In it a distinction is taken between judicial and ministerial acts. We wish to eke out and complete a mere ministerial act—we wish not to change, deface or alter the judgment—we wish only to supply that which is apparently defective, as the record shows the proper amount of the bill of exchange. The doctrine in *Strange* is adopted in 1 *Sanders* 146. These authorities are sufficient to establish the position, that it is proper to amend a ministerial error, and as to the time there can be no other rule or limit than the time fixed for presumption of payment. If this correction can not be made by the Court, we are out of the reach of an error committed by one of its officers. The time of five years delay to make this application, is accounted for, from the fact of there having been many executions issued, and the presumption is, the Court proceeded under the impression that the judgment was correctly entered, and will excuse the want of application to correct it.—6 *Term Reports* 8, 1 *Henry Bl.* 338, 2 *Strange* 786, 3 *Maul. & Selwyn* 591, 3 *Term Rep.* 348, 349; 5 *Burrow* 2730, 3 *Johnson* 526, 1 *Caines' Rep.* 109.

The Courts should not suffer the party to be seriously injured in his rights, because an officer has not done his duty, and no case can be found where they have suffered it. The rights of third persons are sometimes saved, and entry is made to operate between the parties reserving the rights of

third persons—3 *Coven* 39; but Courts always correct a ministerial error, when justice demands it—14 *Johnson* 219, 17 *ib.* 86, 19 *ib.* 244.

This Court has several times passed on this subject, and they have always acted on the principles for which I have contended.—See *Judson vs. Banks, Minor's Reports* 170, 1 *Stewart* 66, *Minor's Reports* 395.

The only remaining question is, if this Court can review the decision on a case of this kind. It has done it in at least five other cases. This Court was established for the express purpose of correcting errors, and it ought to exercise its influence over the Courts below in every case where it can safely be done. If this Court can not revise this decision, it does not answer the object of its creation.

*Goldthwaite, contra.*—I admit that this is a ministerial error, but I deny that ministerial errors were always amendable at Common Law. I will refer to the English statute,—1 *Bacon, letter B, Title Amendments & Jeoffail's*—8 *Henry 6 C.* 12, and many of the authorities refer expressly to this statute. The case cited in *Strange* decides only as to the entry of the amendment, as to continuances and nothing more,—*Bacon, letter A, same title and book.* This authority shows conclusively that at Common Law, nothing is amendable in the record, not even a letter or word.

1 *Comyn* 603, says, that in amendments no error could be amended after the expiration of the term. So the Common Law is here, and we must look to our statutes only—*Dig.* 154. This, it is true, goes very far. Under our statute, before there is an amendment made, there must be a judgment. It is

under the 3d clause of the statute, if any, that the amendment of the judgment must be made, for there is nothing else in the statute to authorise it. Is the word judgment mentioned or referred to, and is there any thing to authorise it? I am aware that the decisions of the Courts are the other way; but in New York the decisions are on their statutes, and here we are to decide on our own statutes. If the decisions which have been read were Common Law, why was it necessary to pass our statute, and why were the English statutes passed? This judgment was entered in 1822 or 1823, and the law which was then in force on the subject must govern. The Common Law as it was, and our statute thereupon, is all the authority we have to go upon. Our statute then is to be carefully looked to, and we are to have nothing to do with all the authorities cited; but as an answer to them, I shall say, that the point was not raised or adverted to, and they can be no authority.

But if the Court decides against me on this point, then I shall say—

1st. That this is a matter of discretion, and a writ of error does not lie.

2nd. If the Court did wrong, there was another remedy which should have been pursued.

1. The statute directly makes it a matter of discretion in the Court to amend. When a party takes a nonsuit, can he take a writ of error for refusal to set it aside, as in the very case under consideration? So in cases of continuances, a loss of the debt may be the consequences, yet no writ of error lies on this. The English Courts consider it as a matter of discretion.—See 2 *Strange*, 1209. If it was not, it would be compulsory on Courts to make it, no mat-

ter how hard it might be in particular cases. So, if they have sometimes refused, it is proof that it is a matter of discretion.

The case in 1 *Wilson*, 61, shows that the Courts can go into consideration of circumstances, as they do on motions for a new trial, which is proof that it is discretionary.—2 *Strange* 1002, 6 *Taunton* 632.

There is not a precedent to be found in the whole English books, where a writ of error was taken on such judgment—See 6 *Taunton* 58, 6 *ib.* 419, 1 *Lord Raymond* 548, 1 *Henry Bl. R.* 36, 4 *Term. Rep.* 228, 1 *Hardin* 171, 2 *Bur.* 756. Now, how do the American authorities consider this matter?—See 17 *Johnson* 346, 6 *Cranch* 217, 2 *Wheaton* 208, 1 *Mason* 153, 4 *Wheaton* 73, 9 *ib.* 576, 4 *Cranch* 273, 7 *Coven* 573, 6 *ib.* 392.

In the case in 1 *Stewart* 66, the question arose on the return of a *sci. fa.* Then, Wilkerson, who could not become a party by motion, should have issued a *sci. fa.* to revive it, because a year and a day had elapsed.—2 *Tidd*.—*sci. fa.*

2. There is another remedy: he may move this Court for a *mandamus* to issue, to compel the Court to proceed and do what is right.—2 *Dunlap's Practice* 1130, 5 *Mass.* 435, 9 *ib.* 389. Here are two authorities from Massachusetts, which are in point. This is not a final judgment. Can they not renew their application if they produce a further showing under a *mandamus* at another time? Here they complain that they obtained a judgment, but the Court refused to enter it; the same as where, in Massachusetts a verdict was rendered, but the Court refused to render judgment on it. 5 *Day* is a very strong case, 286, 235.

It is shewn in 6 *Johnson* 280, that on a motion for a *nunc pro tunc* judgment, a *mandamus* will lie, to allow a deed to be filed *nunc pro tunc* after error brought. The power to issue a *mandamus* is a general power to compel inferior Courts to do what they should, that they would not do so if the inferior Courts had a discretionary power. 1 *Johns. Cases* 231 ; 2 *Johns. Cases* 479 ; 19 *Johns. Reports* 247 ; 3 *Wheaton* 433 ; 4 *Henn. & Munf.* 173.

The statute of 1824 was passed subsequent to the rendition of judgment in this case, and it shows two things.

1st. That the power did not exist before.

2nd. That there is a limitation in it as to time.

I will advert to one fact. There was an error committed, and it is the reason why a demurrer to the evidence was put in. There was a variance in the date of the bill with the declaration.

The Court gave judgment for the plaintiff in error, when they should have given judgment for defendant in error. The Court said they had a right to amend, but no amendment was asked for or made. 1 *Harris & McHenry*, 223, shews that after demurrer to evidence it was too late to amend, and no amendment could have been then made—4 *Wendell*, 409. There was an attempt made to correct the error, but the error was taken advantage of in a legal way. If it had went to the jury the amendment could not have been made, and a non-suit would have been the consequence.

*Thorington*, in reply.

The act of the Court was perfect ; it had decided fully the matter in controversy between the parties.

The clerk omitted to make the correct entry, and this omission was unknown to the plaintiff. The objections are, 1st. That there is no power in the Court to make the correction. 2nd. If power once existed it is gone. 3rd. That the Court erred in giving the first judgment; but the correctness of the first judgment cannot here be questioned, as it is not before us. Many statutes of amendments have been cited. This is not an amendment, but it is not material. Mr. *Goldthwaite* says, that all decisions of amendments are founded on statutes, but this is not the case. The note in *Sanders*, says that at Common Law, you may eke out what is necessary in a record. The statutes were not made to correct cases like this, but to change something. In the case in *H. Blackstone*, the judgment was for less than it should have been: there it was enlarged. The one in *Strange*, 786, was an omission to give judgment on certain counts: this was a case of an amendment. The case in *Maule & Selwyn*, was an omission: the record was afterwards perfected. This was a case of eking out, and it was good at Common Law. That authority applies strictly to this case: a practice has here grown up, and as it is convenient, the Court will sustain it.

We are told that we could ask for a *mandamus*, to obtain a remedy, but what kind of *mandamus* could we send down to the Court below? In New York a *mandamus* goes to an officer who is permanent in his office. The remedy to enforce a *mandamus* compels obedience by attachment. If you send a *mandamus* to the present Judge of the Circuit Court, he will say he knows nothing about the matter—that he was not sitting when the judgment was given. But here the *mandamus* would go to one of this very

Court, from himself—he must answer to himself. In this case the Judge has not refused to act, he has acted and given judgment for cost: he has given judgment according to law as he believes it to be: Then it is evident that a *mandamus* does not lie.

Our statute and constitution have given to this Court a general supervising power and control over other jurisdictions.

In relation to the time of moving for this amendment, this Court has permitted amendments after longer time than this—see *Laprade vs. Crowell*. It is true that the Courts generally require it to be done early, because false motions might be made and they would tend to delay; but this does not apply here. The plaintiff showed anxiety to proceed by suing out executions. The statutes of 1824, are not disabling statutes; for amending and creating anew, are two distinct things. It is unnecessary to labor this case as I would if the practice on it had been established: the law must be settled, and it is all important that it should not be disturbed.

WHITE, J.—George Wilkerson now deceased, commenced suit on a bill of exchange against Henry Goldthwaite, in the Circuit Court of Montgomery county. To the evidence adduced by the plaintiff, the defendant demurred, and at the April term 1823, the Court overruled the demurrer and adjudged the evidence sufficient to maintain the issue on the part of the plaintiff. The clerk in entering the judgment failed to mention the sum recovered. The words of the judgment after stating the case and the examination thereof by the Court are as follows: "It seems to the Court that the said evidence is sufficient in

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law to maintain the issue joined between said parties; therefore, it is considered by the Court that the plaintiff recover of the defendant," without saying to what amount. Before the defect of this judgment were discovered several executions issued; by which, however, none of the money was made. The present plaintiff in error, as administrator of George Wilkerson, and upon sufficient notice given, moved the Court below, at the September term 1828, for an order *nunc pro tunc*, to perfect said judgment. This motion was overruled, and a judgment entered against the plaintiff for costs. This decision of the Circuit Court is now before us on writ of error for revision. The case presents questions of importance, and perhaps some of real difficulty. In argument, it is conceded that, as the clerk was bound to insert the sum recovered, the omission to do this was a clerical error or misprision. But the defendant contends that the judgment could not be amended at the subsequent term by the rules of the Common Law, or the provisions of our statute of amendments passed in 1807, and that if embraced by the act of 1824, more than three years had elapsed, and the right to amend was thereby barred. It is undeniable, that the Common Law placed many restrictions on the Courts in granting amendments, and hence the necessity of the various statutes of England to prevent injustice from mistakes and casualties, incident to the imperfection of human action. But notwithstanding this strictness, mere ministerial acts were amendable at Common Law after the term had passed. The Chief Justice, in delivering the opinion of the Court, in the case of *Phillips vs. Smith*,\* says, "that continuances might be entered at any time, as well after as before the judg-

\* J. Strange  
139.



ment, and he took a distinction between judicial and ministerial acts." The first of which, he says, were at Common Law, amendable at any time; and as to amendments of judicial acts, "a difference was made between such as deface and alter the record, and those which are only additional to it, made in order to eke out and complete it." Now, if the defect here sought to be amended, were in strictness, a judicial act, might it not, according to this authority, be amended. It would be merely completing the record, or in the language of the book, ekeing it out, so as to make it complete. Without such amendment the judgment is most inoperative and incomplete: and if to perfect it be allowed by Common Law, then it might well have been done without the aid of statutes. But it is admitted, the omission is a clerical mistake, the insertion of damages is a ministerial act, and therefore clearly embraced by the principles of the case referred to.

In the note to 1 *Saunders' Pl.* 346, Lord *Mansfield* says, "one point is extremely clear, that the return of the caption to this Court is merely a ministerial act, and admitting it to be a ministerial act, the rule in *Phillips vs. Smith* is conclusive, that ministerial acts are amendable at Common Law at any time. On such applications as this, the Court of B. R. has adopted the rule to amend, whenever the ends of justice require.

In 6 *Term Rep.* 8, *Mara vs. Guin*, Lord *Kenyon* uses this strong language, "the forms of the Courts are always best used, when they are made subservient to the justice of the case;" and the same distinguished jurist, in a case from 7 *Term R.* 699, which I observe referred to by another book, (but

which I have not before me,) says expressly, that such amendments are not made under the statutes of *Jeofails*, but under the general authority of the Courts.

The Court in the case of *Shorts vs. Coffen, executor of Coffen*,\* after taking two or three days to consider, were clearly of opinion to amend a judgment against an executor, *de bonis propriis*, by making it *de bonis testatoris, si, &c.; et de bonis propriis, si non, &c.*: and that too, even after writ of error had been brought; and *in nullo est erratum* pleaded; and an argument in the Exchequer Chamber—(upon the authority of this case,)—the Court of New York allowed precisely a similar amendment.<sup>b</sup>

\* Burrow  
2750

b 1 Cowen  
132  
• 1 Cain 9

In the case of *Samin and others vs. Drake*,\* the Court permitted the judgment to be signed *nunc pro tunc*, and observed, "the omission was the neglect of one of their officers which ought not to prejudice any one." Many other authorities might be adduced, if necessary, to the same point. But these surely are sufficient to shew that, by the very constitution of Courts of justice, and to answer the ends of their creation, they have, by the rules of the Common Law, power, so far to correct the omissions of their own ministerial officers by entering judgments *nunc pro tunc*, as not to allow their mistakes to defeat the purposes of justice. This question, however, is not strictly open for discussion in this State. It has long been the practice of the Circuit Courts to enter judgments *nunc pro tunc*, whenever essential to the interest of suitors and where the record furnished sufficient *data* for such judgments: and this practice has frequently been sanctioned by the adjudications of this Court. The cases of *Fugua & Hemlett vs.*

*Carriell & Martin*,—*Clemens vs. Judson & Banks*,<sup>Minor's Rep. 170.</sup>  
 and *Draughan vs. The Tombeckbee Bank*, are to this<sup>ibid. 395.</sup>  
 point.

But it is further insisted, that even if this power be allowed the Courts, it is merely a discretionary power, from a decision in the exercise of which a writ of error will not lie. It is true inferior Courts do possess certain discretionary powers, which if abused, can not be corrected on error: and perhaps the nature of these powers will best appear by reference to some of the cases in which they are known to exist. Continuances, new trials, and motions to amend pleadings out of the time prescribed by statute for their being filed, are of this character. In such cases, though a mistake of a Court might as seriously injure a party as an error in the final judgment, yet a writ of error would not lie. The policy of the law requires this; for, from the very nature of the enquiries, it is impossible that a revising Court should be as fully in possession of the facts necessary to a judicious exercise of such discretion, as the inferior tribunal, before which they are all developed. As, however, there are evils attending this restriction, it should never be carried beyond the reasons on which it is founded; and perhaps it may be assumed as a good general principle, at least, that whenever a case can be exhibited of record to an appellate Court, in precisely the same attitude which it presented in the Court below, a writ of error will lie, if the judgment be final. What then is there in this case, which was exhibited in the Circuit Court, and that does not appear of record here?

We have before us the entire grounds of the motion, and all the facts of the case. I can conceive, of

nothing which would have influenced the Circuit Court, which is not now before us for our consideration.

But again, I think it fairly deducible from the authorities already referred to, on another branch of this case, that where a ministerial officer of a Court is required by law to do a particular act, which he fails to do, greatly to the prejudice of a suitor's rights, it is not duly the province of the Court to correct that error, when there is sufficient *data* on which it can be amended with legal certainty and precision, but that it is the undoubted right of the injured party to demand that the error should be corrected. The judgment was the means of redress given by the law to the party; but as at first entered, it was insufficient for the purpose designed. Then surely, upon a proper case presented to a Court, having ample powers, it was as much a matter of right to demand its amendment, in order to attain the very object of the law itself, as to have had it entered correctly, when the demurrer was disposed of. It is, however, farther contended, that admitting a writ of error might have been prosecuted by the other party, had the Court allowed the amendment, it will not lie, as the case is now situated—the Court having refused the motion. That it is not a final judgment within the meaning of our statute, allowing writs of error; and that if the plaintiff be aggrieved, he must seek redress by a *mandamus*. Why was not this a final judgment? It was clearly a final disposition of the case on the circuit, for no other Judge, according to the established practice of our Courts, would, afterwards, have heard the motion. It was, moreover, a judgment for costs, by which the party was aggrieved,

and for which an execution would have issued. To my mind there is not that wide distinction between a judgment denying and one sustaining a motion, which is supposed: at least this Court has not recognized the distinction. For, during this very term, we have taken cognizance of a judgment of the Circuit Court of Jefferson county, where there was a *refusal*, on motion, to enter satisfaction of record, and have affirmed that judgment.

In the case of *Creighton vs. Denby*,<sup>a</sup> the point was expressly made, whether a writ of error would lie from a decision of the Circuit Court, overruling a motion to quash an execution; and the Court, upon the authority of several cases there cited, say, that the decision was a final judgment upon the matter therein litigated; and the party dissatisfied had a right to have it reviewed in this Court. Indeed the doctrine seems to have been so well understood that in the case of *Thurman vs. Matthews*,<sup>b</sup> which was a writ of error to reverse for refusing to arrest the judgment below, the question was not made; though in other States it has been determined that on such refusal, error would not lie.

Between the case in *Minor's Reports*, and the present, I can perceive no difference in principle; and we are not disposed to disturb a settled and salutary rule to favor what, at best, is nothing more than a distinction without a difference; especially when the remedy by *mandamus*, if it could be had, would be dilatory and badly adapted to the organization of our Courts. We are therefore of opinion, that the Court below erred, in refusing to amend the judgment *nunc pro tunc*—for which the judgment must be reversed, and the cause remanded.

<sup>a</sup> Minor's  
Rep. 250.

<sup>b</sup> 1 Stewart's  
Rep. 385.

In doing this, we have not felt ourselves authorised to go farther back than to the single enquiry, whether the Circuit Court ought, or ought not, to have sustained the motion to perfect the original judgment, by allowing the amount recovered to be inserted. Upon all the other features of the case, the Judge had passed in overruling the demurrer to the evidence, and if he erred, it will be matter for future revisal.

TAYLOR, J.—As my opinion corresponds with that of the majority of the Court, as delivered by my brother *White*, on every point but one, it is only necessary for me to notice that one.

I believe that there is no final judgment in the Court below, and that the motion to dismiss the writ of error should be sustained.

I understand a final judgment to be *res adjudicata*. That the question which has been decided can not be again agitated in the Court which made the decision, in the same form. This is certainly not the case with respect to a motion for a judgment *nunc pro tunc*, which is overruled. I am aware that some additional reason must be shewn before the Court would again hear a motion which had, at a previous term, been overruled, but it is by no means difficult to imagine cases in which it would be done. If in a new county, where books were not to be had, such a motion were made and overruled, but upon consulting authority, it was found that the cases all sustained the motion, certainly it would be heard again. But it is not difficult to suppose a case, in which extreme injustice would attend a contrary practice. A motion of the kind is made and overruled, from the insufficiency of the evidence adduced in support of

the motion. It is reasonable to be presumed that the Supreme Court would decide in the same way ; but afterwards, an old docket, which had been mislaid, is found, containing a distinct memorandum of the judgment, in the hand writing of the Judge who presided. This additional testimony can not be used on the trial in the appellate Court, because, strictly, forms no part of the record : is the party to remain without redress ? So the Court determines.

But it has been said that the peculiar organization of our Court demands the decision, that one Judge will not hear the judgment of his predecessor controverted. To my mind this objection produces no difficulty. By the alternation of the Judges, it was never intended to change the rules of decisions, nor to cast new burthens upon suitors, and although I should feel as great a delicacy as any person in rehearing points discussed which had previously been decided by another member of the bench, in the same cause, yet if new facts were introduced which were not before him, I should not hesitate to hear and to determine.

But this is not a matter left to reason alone; the authorities are full upon the subject.

It is unnecessary to adduce authority to prove that a writ of error can be sued out upon no other than a *final* judgment. This position has been taken so often by this Court, and is so completely within the words of our statute, which is affirmatory of the Common Law, as maintained by an unbroken chain of decisions, that it would be but time lost to occupy any on this part of the subject. But the question is, *what is a final judgment ?*

In the case of *Horne vs. Barney*, Chief Justice <sup>19 Johns.</sup>  
R. 247.

\* 2 Johns.  
R. 101.

*Spencer* speaks of it as settled law, that if a judgment be arrested for the insufficiency of the declaration, that a writ of error will not lie. See the same doctrine in *Bayard vs. Malcolm*.<sup>\*</sup> When a judgment is arrested, there is a decision of the Court arresting that judgment, and costs are uniformly given to the party making the motion; yet it is not a final judgment. Another action may be brought on that which constitutes the foundation of the suit in which the judgment was arrested. So it has been determined in this Court; that a writ of error will not be sustained on a judgment of nonsuit. Why? Other reasons may be given, it is true, but the strongest is because it is not a final judgment; the party has remedy by another action. The same, it seems to me, is the only consistent doctrine in the case before the Court. A Court overrules a motion for a judgment *nunc pro tunc*. Is there a final judgment rendered by the Court? Does the case assume the nature of *res adjudicata*? Surely not. The plaintiff may institute another action, and prosecute it to a recovery. It is unnecessary to multiply authorities to support this position.

But it is said, that this Court has adopted a different rule. It is true, that the decision, on a motion to quash an execution, whether sustaining or refusing it, has been determined by this Court to be ground for error.

The opinion given in the case rests for authority entirely on some Virginia cases; but neither in that State, nor any other, can a decision, analagous to the one which is asked in this, be found. A motion to quash an execution, even if unsuccessful, places the party in a very different situation from one in arrest



of judgment, or for a judgment *nunc pro tunc*. In the first case, the plaintiff has not only a subsisting judgment, but the means of immediately coercing that judgment. Delay here would be dangerous, and before the defendant could regularly proceed by *mandamus*, it might be too late. Not so here—none of this urgency exists, and the party has ample time to pursue that remedy, which has heretofore been open to him, without the probability of being placed in a worse situation.

It is certainly unnecessary to answer the argument which is founded upon the decisions of this Court, sustaining writs of error which brought up cases after a judgment *nunc pro tunc* had been ordered by an inferior Court. It requires no astuteness to perceive that, in such case, there is a final judgment. The record is made perfect by the judgment, and the whole case is open for re-examination by this Court. The party is not confined to errors committed in the proceedings upon the judgment *nunc pro tunc*, for that constitutes only a part of the record which it perfects.

I am, therefore, of opinion, the writ of error should be dismissed.

My opinion was the same in the case of *Baylor vs. McGregor & Darling*, decided at a previous day of this term.

HUNT & NORRIS *versus* TOULMIN.

It is in the power of a party applying for the charge of a Court, to have it specifically applied to every point arising on the evidence; and where the charge is asked in such general manner, as that when given it may not be as explicit as the testimony would authorise: it is not a ground of reversal, that the charge was too general.

A party, undertaking to perform a piece of work for another, will be required to complete it according to the contract, but where the work fails after its completion, by any means not within the control of the contracting party, this will not bar a recovery for the price contracted to be paid.

In error from Mobile Circuit Court.

This was an action of assumpsit. Toulmin, the defendant in error, had undertaken, for a stipulated price, to build the walls of a brick house for the plaintiffs. Shortly after their completion, the house fell, and the present action was brought to recover the amount contracted to be paid for the work. The witnesses examined on the trial, assigned different reasons for the destruction of the house. By some, it was attributed to a defect in the roof; and by others to a pile driving machine, in operation in an adjoining lot. The Court charged the jury, "that if from the evidence, they believed Toulmin had performed the agreement on his part, and that on the erection of the building, there was no deficiency in the work, or in the materials, which occasioned the walls to fall, but that their falling was fairly attributable to some other cause, not created by Toulmin, or within his control; then they should find in his favor—otherwise, their verdict should be against him."

The defendants below, by their counsel, excepted to this charge of the Court, and assigned for error

here, that the charge was too general—that it was speculative and erroneous in law, and calculated to mislead the jury.

*Hitchcock and Gordon, for plaintiff.*

*Elliott & Cramford, contra.*

LIPSCOMB, C. J.—The facts of this case, as far as they can be collected from the record, are these:—Toulmin, the defendant in error, had undertaken to build the walls of a brick house for the plaintiffs in error. The walls were built, and a short time after the roof had been put on, the building fell down. This action was brought by Toulmin, to recover the price stipulated to be paid for it. The foundation for the walls, it is understood, was not to be made by Toulmin. It appears, from the bill of exceptions, that a great many witnesses were examined on the trial, and much contrariety of opinion expressed as to the cause of the falling of the walls. One of the walls was not plumb; and it was the opinion of some, that the wall was originally plumb, but that the bulge had been occasioned by the jarring of the earth, from the use of a pile driving machine, belonging to Mr. Hitchcock, on a lot adjoining, when the wall was only about eight feet high; and others were of opinion, that it was attributable to a defect in the roof. “The Court charged the jury, that if, from the evidence, they believed that Toulmin had performed the agreement on his part, and that in the erection of the building there was no deficiency in the work, or in the materials, which occasioned the walls to fall, but that the falling of the walls was fairly attributable to some other cause not

created by him, or within his control, then they should find in his favor—otherwise, their verdict should be against him.”

The objection taken to this charge is, that “it is speculative, and erroneous in law,” and calculated to mislead the jury; that under this charge, the jury might have thought, that if the pile driving machine had been the cause of the walls’ falling, Toulmin would have been still entitled to a recovery, when it was his duty, under the contract, to have made good the defect in the wall when it occurred, and not to have progressed with the work until the defect had been repaired. It was not agreed, that this had been the view taken by the jury, but only that they might so have viewed it.

<sup>a</sup> 2 Peters  
R. 625.

In *Chirac et al. vs. Reineker*,<sup>a</sup> Judge Story, in giving the opinion of the Court, objects to the charge of the Court below, on the ground that it was speculative, and on a hypothetical state of facts not warranted by the evidence; but his objection was, mainly, to its being erroneous in point of law.

In a case between the same parties in 11 *Wheaton*, 59, one of the grounds relied on was, that the Court below had erred in charging the jury erroneously in a hypothetical case, not warranted by the testimony. Chief Justice *Marshall* in giving the opinion of the Court, recognizes the power of the Court to revise such a case, and reverse it, if such erroneous charge had an influence in procuring the verdict of the jury. I infer from the tenor of his remarks, that to make it a ground of reversal, there must be a concurrence of error in point of law, in the charge given, and an influence on the jury in forming their verdict. If given under such circum-

stances, as not to influence them, it would not be a sufficient ground for the reversal.

In the case of *Lyon et al. vs. The Huntington Bank*,<sup>42Serg. & Rawls 61</sup> several bonds were assigned to the Bank with powers of attorney to confess judgment, (and this was done at the request of the Bank,) as collateral security, as well for the Bank as for the endorsers of a note discounted by the Bank. The Bank had possession of the bonds so assigned. The defence set up was the negligence of the Bank in not collecting the bonds so assigned; the judge in the Court below, charged the jury, that the not entering judgment on the bonds and issuing executions was as much the fault of the endorsers, as the Bank. The Supreme Court reversed this judgment, and Chief Justice *Tilghman*, in giving the opinion of the Court, rests the reversal mainly on the ground, that the charge given was wrong in point of law, and on a question material to the endorsers. The bonds were in possession of the Bank, and the endorsers had no control over them. If there was any agreement by which the Bank was relieved from using diligence in the collection of the bonds, it was incumbent on it, to make that fact out in evidence. This case was not decided on the ground of the charge being speculative, but that it was wrong on a point material to the endorsers.

The conclusion to be drawn from these cases, seems to me, to be, that to make a decision of an abstract question, not called for by the testimony, ground of a reversal, it must be wrong in point of law, and must have had an influence on the jury in forming their verdict: much stress seems always to be laid on the last. How the Court in *Chirac v. Reinecker*,

(before referred to) came to the conclusion, that the uncalled for opinion, on an abstract question, had an influence on the jury, does not appear from the record, further than may be collected from the fact, that the charge was made at the request and in the precise language of the party, who obtained the verdict; the inference from this circumstance is very strong, that the charge had the influence ascribed to it.

<sup>a</sup> 12 Searg. & Rawle, 149. In the case of *Barton vs. Glasgow*, the doctrine is laid down, that if the Court is not called on to charge the jury on a particular point, and in its general charge lays down the general principles of the law correctly, the judgment will not be reversed, because a more pertinent charge might have been given. If there are particular circumstances to exempt the case from the operation of a general rule, it is the business of counsel to ask the opinion of the Court, of the law on those circumstances.

<sup>b</sup> 2 Peters, 15. In the case of *Pennock and Sellers vs. Dialogue*, the evidence was set out in the record, and the question was raised, that it called for other and explanatory directions to the jury than were contained in the charge of the Court below. Judge *Story*, in giving the opinion of the Court, says, that it is no ground of reversal, that the Court below omitted to give directions to the jury on any points of law which might arise in a cause, where it was not requested by either party at the trial. It is sufficient for us, that the Court has given us erroneous directions. If either party deems any point presented by the evidence, to be omitted in the charge, it is competent for such party to require an opinion of the Court upon that point. If he does not, it is a waiver of it. Let

us apply the principles of the case cited, to the one under consideration. Is the charge of the Court below, speculative and erroneous in law : and if it is, has a reasonable ground been shewn from which to infer that it had an influence on the jury in forming the verdict?

The charge of the Judge must be taken altogether, if we wish to arrive at its true meaning : it is not to be detached, and separate members of the same sentence to receive a construction as though it stood unconnected with other members or branches of the sentence. The charge must also be applied to the state of facts presented by the record. The evidence shewed that the house had fallen, after it had passed from the hands of Toulmin. Then, in the language of the Judge's charge, if he had performed the agreement on his part, he was entitled to recover. This part of the charge, that if he had performed the agreement on his part, is very comprehensive ; it would embrace every thing that the law of his agreement required : any failure, the least possible under this instruction, would prevent a recovery. It was so far strictly appropriate and pertinent to the facts disclosed by the record. Let us see if the subsequent parts of the charge convey a different meaning. The Judge, after telling the jury what was required by the agreement, by way of illustration, says, that if the falling of the wall was fairly attributable to some other cause not created by him, or within his control, he was entitled to recover—meant nothing more than, if after such fulfilment of his agreement in every thing that the law required, the wall had fallen, he was not accountable—that his risk extended no further than to the completion of the work he

had undertaken. If there had been a different state of facts, and Toulmin had attempted to excuse himself from performance, the Judge's charge would then have been fairly obnoxious to the objections taken, as nothing would excuse for a non-performance—not even the acts of God. If the walls, before they were finished, had been prostrated by a storm, an earthquake, or any other cause, the contractor would still be bound to finish them according to contract.

This, however, is nothing like the state of facts presented. It is to the last branch of the charge, that the plaintiffs in error ground their objections, and contend that it would authorise the jury to excuse Toulmin from the effects of the machine for driving piling on the walls. If the operation of the machine, had the effect to bulge the wall, not from any defect in the foundation. Toulmin was certainly bound to repair it; but if this deleterious effect on the wall was produced from a want of a good foundation, he would not be accountable for it. If he failed in doing any thing the law of his contract required of him, he had not performed and had not brought himself under the Judge's charge. It is true, that he may have had no control over the machine that some of the witnesses supposed occasioned the defect in the wall, but he had a control over that defective wall. If, therefore, the last part of the Judge's charge should be carried back, and construed to relate to the period whilst the work was in progress, it is altogether consistent, and did not authorise the jury to relieve Toulmin from any thing that his contract required.

If the charge was too general and not sufficiently explicit on any point, and the plaintiffs in error had been under any apprehension that it would not be



sufficiently understood by the jury in applying it to a particular point in their case, it was their province to ask the Court to instruct the jury on the law, as applicable to such point. They should have asked the Judge to instruct the jury, that if they believed, the falling of the wall was in consequence of its being thrown out of place by the jarring produced from the operation of the machine, and that this was not from a want of a good foundation, that Toulmin was not entitled to recover. The Judge would have been fully apprised of the point wished to be presented, otherwise he could not know to what part of the charge the exception was taken. This view is fully supported by the case of *Pennock & Sellers vs. Dialogue*.

We should not be astute in seeking grounds for reversing the judgments of Courts below: if there is an ambiguity we should incline to support the judgment, rather than to reverse; and in all cases, if the error is not clear from the record, we should affirm. The party seeking a reversal must be specific in shewing the error complained of. It is not sufficient that there may have been error: it must be shewn to have intervened.

The Court was not requested to give any particular charge: but the charge was a general one, in which it seems to me the general principles of the law of the case were correctly laid down. It is neither speculative, nor erroneous. It was not as explicit as the testimony would have authorised; but this is no ground of reversal.

COLLIER, J.—I am of opinion that the judgment of the Circuit Court should not be sustained. The

charge of the Judge seems to me to proceed upon the hypothesis that the failure of a party to perform an express covenant may be excused by shewing that he was prevented by the interference of a third person over whose acts he had no control. The con-

\* 1 Peter's  
C.C. R. 83  
and 221—  
6 Durn. &  
East, 650,  
750 Whea-  
ton's Sel-  
w.

verse is too well settled to require discussion at this day, and is not denied in the opinion of the majority.\*

The proof went to shew that, in the opinion of some of the witnesses, the wall received an injury while in the progress of erection, by the operation of a pile driving machine contiguous to it, employed by another person, which occasioned its fall. If the wall received an injury while incomplete, and the defendant, without repairing the injury, went on to complete it, he certainly did not satisfy the stipulations of his contract: and the charge of the Court, by which the jury were informed that if the fall was produced by an agency over which the defendant had no control, was equivalent to saying, if the fall resulted from the employment of the pile driving machine the plaintiffs were not entitled to recover.

The idea that it is not error if a Court omit to instruct the jury upon all the questions of law which the facts elicit, unless particularly requested, is certainly well founded; and to that effect is *Pennock et*

† 2 Peter's  
Rep. 15; 12  
Searg. and  
Rawle.

*al. vs. Dialogue.*† But neither of these cases, or any other within the scope of my reading, goes the length of determining, that if the charge, as applicable to the facts, is erroneous, that the judgment shall nevertheless be sustained, because the Court was not requested to modify it.

But if I have misconceived the charge in supposing it to be erroneous in point of law, I certainly cannot be mistaken in attributing to it a direct ten-

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dency to mislead the jury, by inducing them to believe that if the fall was occasioned by the pile driving machine the defendant was not liable; and if such was its most probable effect the judgment is erroneous..

\* 2 Peter's  
625.

In every view in which I can consider this case, I think the judgment should be reversed.

CRENSHAW, J. not sitting.

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Where the Clerk in entering a judgment, makes the entry in short, referring to another judgment, the entry of which is full and in proper form, such judgment will not be deemed perfect, so as to authorize issuance of execution thereon.

Each judgment entered during a term must be of itself, full and in proper form, and the imperfections of one cannot be corrected by a reference to another.

On the determination of a motion quashing an execution, a writ of error will lie.

The Tombeckbee Bank obtained a judgment in the Circuit Court of Washington against several parties among whom were the defendants in error. The Clerk in entering up the judgments, drew out one in proper form and at length, and entered the rest in short, referring to the first. The judgment against the defendants was in short, and on it, execution had issued. On motion made, the Court quashed the execution, on the ground of there being no sufficient judgment, on which it could issue.

A writ of error to reverse this decision was thereupon taken to this Court.

*Hitchcock*, for Plaintiff—*Elliott*, *contra*.

TAYLOR, J.—In this case, the Court below quashed an execution which had been issued in favor of the Bank against the defendants, on the ground that there was no sufficient judgment to authorise the execution; and the writ of error was sued out to reverse this decision.

The case has been argued upon its merits, and also upon a preliminary motion made by the defendants to dismiss the writ of error, because there is no final judgment of the Court below.

This Court has so often overruled objections of this kind, and sustained writs of error to bring up the decisions of inferior Courts on similar motions to the one which was made in the Court below in this case, that I feel precluded from entering into an investigation of the general doctrine.

The motion to dismiss must be overruled.

It appears from the record, that this suit was commenced by notice, in the manner authorised by the charter establishing the Tombeckbee Bank. The notice is transcribed as a part of the record; after which, the caption, with which the record should have commenced, is inserted, and the transcript proceeds thus:

"Be it remembered, that a judgment was rendered at the term aforesaid, of the Court aforesaid, in favor of the President, Directors and Company of the Tombeckbee Bank, against Gilbert C. Russell, Benjamin S. Smoot, Chamberlain & Darling, and

"the Executors of Thomas J. Strong, deceased, in  
 "the words and figures following, to wit:

"Judgment. {	Same,
	<i>vs.</i>
	Gilbert C. Russell,
	Benjamin S. Smoot,
	Chamberlain & Darling,
	Ex'rs of Thomas J. Strong.

"Same judgment for three thousand one hundred  
 "dollars, with interest from the 9th April, 1820—  
 "\$3100."

"The clerk then proceeds to state, that the above  
 "judgment refers for form, to a preceding judgment,  
 "rendered at the same term aforesaid, in the words  
 "and figures following, viz:

"Tombeckbee Bank,

*vs.*

"John W. & Lem'l J. Alston, &c."

And transcribes that judgment at length, which is in  
 proper form.

The question is, is there a judgment in this case,  
 upon which an execution can be issued.

Previous adjudications of this Court have settled  
 this question in the negative.

In the case of *Draughan and others vs. The Tom-*  
*beckbee Bank*,<sup>\*1Stewart's</sup> it was decided, that resort can not be  
 had to another case beside the one in which the mo-  
 tion is made, for facts on which to sustain a motion  
 for a judgment *nunc pro tunc*, but that the record of  
 the case itself must furnish sufficient data to sustain  
 the motion. It does not appear from the report of  
 the case, what facts were before the Court, but the  
 decision proves this much, that no resort can be

Rep. 66.

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had to the judgment in the case of the *Bank vs. the Alstons*, to supply the deficiencies of the judgment in this case; and that the clerk can only transcribe the record in the case in which the writ of error is prosecuted, and has no authority to certify to what judgment the entry of one which refers to some other, does refer. The case of *The Tombeckee Bank vs. James D. Godbold*, decided in this Court at the July term of 1830, is full to the point in this case. There the entry of the clerk in the Circuit Court, intended for a judgment, is set out in the opinion of the Court, and if there be any difference, is more definite than the one now under consideration. The name of the plaintiff, as well as of the defendants, is given in the entry, which afterwards is in these words:

" Judgment at April term 1821, for	\$4907
" Interest up to April term,	122 68
	<hr/>
	\$5029 68

In that case the Court say, "we are of opinion that the statement offered in the Court below as a judgment can not be considered as such, but must be viewed as a mere memorandum of the Clerk from which a formal judgment could thereafter be drawn up."

It is insisted, however, by the plaintiffs counsel, that the transcript in this case shews there was a judgment, and the statement of the Clerk is referred to for the purpose of sustaining that position. That statement immediately succeeds the usual caption to the record, and is evidently only the opinion of the the clerk; and not a transcript of any part of the proceedings of the case. A complete record should on-

ly embody the whole proceedings, which have been had in the suit, and which appears by the papers and minutes of the Court, and nothing can be added to it which does not appear in those proceedings. If the clerk undertakes to make that good from memory or in any other way, which according to the papers and entries in a case is bad, any thing supplied by him must be rejected.

The Court has been requested to give an opinion as to the sufficiency of the proceedings to authorise a judgment *nunc pro tunc* in the Circuit Court. I do not hesitate to say, were this *res integra*, I should think the facts sufficient to authorise such a judgment. How far the case of *Draughan vs. The Tombeckbee Bank* might come into collision with such a decision, I know not without examining the record in that case; and even were they such as to make it a case in point, I should feel strongly inclined to overrule it. But as there is not unanimity of opinion on this subject, and two of the members of this Court have declined sitting on the trial of the case, it is thought inexpedient to determine that point.

Let the judgment be affirmed.

LIPSCOMB, C. J. and SAFFOLD, J. not sitting.

TRAVIS *vs.* ALLEN.TRAVIS *versus* ALLEN.

A having shipped goods from New York for Mobile, which became damaged on the passage, proceeded to call the Port Wardens to view the goods, with the purpose of charging the ship owners. B, the agent of the ship owners, promised A that if he would desist, and proceed to sell his goods at auction, he, B, would pay the amount of the loss. In an action to recover the amount of the loss from B—Held—

That the promise was not within the statute of frauds, but that B, was liable.

Travis brought his action of assumpsit in Mobile Circuit Court, to recover of Allen the sum of one hundred and sixty eight dollars and thirty two cents. Allen was the agent, or consignee of the owners of the ship Amelia, on which vessel Travis had shipped sundry goods from New York to Mobile. On the passage, the goods became damaged, and Travis was about calling on the Port Wardens to survey the goods, in order to charge the owners. Allen then told the Plaintiff that if he would not proceed thus, but would brush up his goods, and sell them at auction, he would pay whatever amount should accrue between the auction sale, and the original invoice price. Travis, in compliance with this undertaking, sold the goods and brought the present action to recover for the loss sustained.

The defendant demurred to the declaration; and the Court considering the case within the statute of frauds, sustained the demurrer. To reverse the judgment thus rendered, the case was brought to this Court, and the same assigned for error.

*Hitchcock*, for Plaintiff—*Cranford*, contra.



SAFFOLD, J.—The relative situation of the parties, as plaintiff and defendant, was the same in the Court below that it is in this Court. The declaration was in assumpsit, and contained three counts, in substance as follows : That the plaintiff Travis shipped goods from New York to Mobile, in the ship *Amelia*, which goods were damaged on the passage. Allen was the agent and consignee of the ship owners. Travis having determined to call the port wardens to have a survey of the goods with a view to charge the ship owners, and being about to do so, Allen then told him if he would not thus proceed, but would clean and brush up the goods and sell them to the best advantage at auction, he, Allen would pay him the difference between the invoice price, and that for which they should sell. Travis did so pursuant to Allen's request, and the loss amounted to one hundred and sixty eight dollars thirty two cents; for which the action was brought.

Allen demurred generally to the declaration; and the Court considering the case within the statute of frauds, sustained the demurrer.

The judgment on demurrer, is the cause assigned for error.

Our statute of frauds, so far as regards this contest, is a literal transcript of the English statute of 29 Charles II, as is also the statute of New York, and of most or all the other States of the Union. The decisions, therefore, which have been correctly made under either of the others, are good authority in reference to ours. Its language is, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agree-

ment on which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." Here it is conceded the agreement was not in writing; and the question is, was the contract void?

The classification of contracts involving this doctrine, as recognised by the Supreme Court of New York, and many other tribunals of the highest respectability, is,

1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the credit given to the principal or direct debtor. In such there is not, nor need be, any other consideration than that moving between the creditor and original debtor.

2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. There must be some further consideration shewn, having an immediate respect to such liability, for the consideration of the original debt will not attach to this subsequent promise. And,

3. Cases where the promise to pay the debt of another, arises out of some *new* and *original consideration* of benefit or harm, moving between the newly contracting parties—*Leonard vs. Oredenburgh*.<sup>a</sup> The two first classes of cases are within the statute of frauds, but the last is not—*S. C. and note g. appended, also 1 Saund. 211, note 2.*

<sup>a</sup> 8 Johns.  
Rep. 28.

A distinction has often prevailed (more uniformly in the early decisions,) between what were considered *original*, and those deemed *collateral* undertakings; and this distinction has been recognised as the criterion by which to determine whether or not the contract was affected by the statute. That the former were not, and the latter were—that if the person for whose *debt, duty or miscarriage*, the undertaking was made, was liable at all, so that the entire responsibility did not rest upon the other person, his promise was considered collateral, and if not reduced to writing, was void. If, however, no other person was liable for the *same debt, duty or miscarriage*, although the other person may have been liable for a *distinct debt, &c.*, which was the measure of the one in question; in such case the undertaking has been considered an original one, and not within the statute. Yet as has been well observed by an eminent jurist, it should be borne in mind that although *collateral promise* has become the technical phrase, whereby the promise within the statute has generally been distinguished, such words do not occur in the statute itself, and cannot therefore, be taken as a certain criterion, in deciding whether a promise for another is or is not within the meaning of this law. The promise, mentioned in the statute, is as well that whereby a man undertakes to answer for the debt, as for the *default* of another. The principle is also <sup>Roberts on F. 225</sup> held by the same writer and others of equal merit, and from which I have no disposition to dissent, that the policy of this statute, like most others determining the rights of property, entitles it to a just and liberal construction. I would administer it according to what appears to have been its true spirit and intent—neither abridging nor extending its operation.

\* 3 Burr  
1886.

The case of *Williams vs. Leper*,\* cited on the part of the plaintiff, is one justly supposed to afford the most satisfactory illustration of the branch of the statute involved in this case. There, Leper, in the capacity of broker, being about to sell the effects of an insolvent debtor for the benefit of his creditors, Williams, the landlord, came to distrain the goods in the house—the broker promised the landlord to pay his debt if he would desist from distraining: and he did thereupon desist, the agreement being by parol.

The Court decided that undertaking not to be within the statute of frauds. That the *res gestæ* entitled the landlord to recover his rent of the broker. The reason employed was that Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien—that the goods were the fund out of which the debt was to be paid; and that it was not a collateral, but an original undertaking.

Although it is true, as contended in behalf of the defendant, that there is some dissimilarity between the features of that case and this, yet they are believed in principle to bear a material analogy to each other. Without the aid of the agreement, Leper was as free from responsibility for the rent, as was Allen for the damages sustained in the goods; they were both in the exercise of an agency which subjected them to a moral obligation to make the promises they did, and to comply with them, or otherwise to indemnify the plaintiffs—both were clothed with delegated discretion to render justice to the adverse parties without litigation or delay, and (as I think may be fairly inferred in this case as well as the other) without any individual loss or responsibility, as the agency of each afforded the means to perform his agree-

ment. Admitting that in this case the claim for the damages still exist against the ship owners, it was equally so in the case cited ; except, that there the certain or most probable means of obtaining satisfaction were lost in consequence of the agreement ; and in this case from like cause, the safe and usual course of having the damages assessed by the wardens, and abandoning the goods to the ship owners, as intended, was defeated—a procedure, which, according to its ordinary results and probable tendency, would have secured to the plaintiff quite as much as the defendant promised him, and without delay. In that case it is also true, that the landlord had a lien on the effects for his rent, and some of the Judges considered the agreement in the nature of a purchase of the effects from him by the broker. In this case, the effect of the agreement was to induce the plaintiff to retain and sell for his own benefit, and at auction, (according to the facts stated) damaged goods which otherwise he would have had a right to abandon at the risk of ship-owners. It also imposed on him the expense of cleaning the goods, preparatory to the sale, and if it be admitted, that notwithstanding the undertaking, the plaintiff was entitled, on sufficient proof, to redress by suit against the owners of the vessel, it is evident he was placed in a very unfavorable attitude for doing so ; for though the survey of the wardens would not have been of itself evidence of the damages, the testimony of the individual also holding the office and who had acted under the solemnity of an oath, would have been much the most safe and satisfactory evidence that the case admitted of. Nor can it be overlooked, that the transaction had a direct tendency, so far as to delude the

plaintiff, as to induce him to neglect the precaution of having the goods inspected by any persons before the sale, who would have been competent witnesses to prove the extent of the damages. It is also worthy of remark, that as a consequence of the sale at auction, there was probably a sacrifice in the true value of the goods. If so, and the plaintiff was prompted to it by an illegal contract, he could not expect indemnity for so much, in an action against the owners of the vessel; nor can it appear that they would not have been enabled to secure themselves out of the damaged goods by private sale, or otherwise, had they been abandoned to them according to the usual course of commerce.

In an action against them, the plaintiff must have encountered this objection, as well as resistance, on the ground of the different agreement between himself and their agent; together with the difficulty arising from the delay in electing his remedy, and the, probably, imperfect testimony—all which were consequences of the undertaking, which is the foundation of this action, and which from its nature and effects, would appear to constitute a new contract on a distinct consideration. The ship-owners were never chargeable with this particular debt. Their responsibility was for the price of the goods, if abandoned: otherwise, for the true amount of the damages sustained, according to the remedy sought. Their liability, therefore, was but the inducement and measure of this debt; so that in any view of the case, this must be regarded as an original demand, as contemplated in various decisions on the statute. It has been ruled, that if the original debtor is intended to be only *relatively*, and not absolutely discharg-

ed, and the person, promising, substitutes himself as the debtor, in consideration of the *release* of the party indebted, *quoad the original creditor*, the right of suing for the original debt being only understood to be transferred, the transaction assumes a character which, in many cases, has been considered not within the statute.\* It is admitted that no certain <sup>•Roberts on Fr. 225.</sup> abstract rule in relation to this statute, has or can be laid down for the government of all other cases, but that much has of necessity been left to float on the facts and circumstances of the particular cases.<sup>b</sup> Yet <sup>Idem 223.</sup> it is believed the views I have advanced are in accordance with the most current rules of decision in the several Courts of the United States, as well as the great variety of cases reviewed in *Roberts on Frauds*.

Of the latter cases, it is deemed sufficient to notice but one other.<sup>c</sup> It was an action for the repairs of a <sup>c 3 Esp. N. P. Cas. 83.</sup> carriage: it belonged to a Mr. Copey, and had been sent by the defendant to the plaintiffs to be repaired, the orders concerning it being given by the defendant. The bill for the repairs was made out in the name of Copey, who was known to the plaintiffs as the owner. The work being done, the defendant sent an order to pack up the carriage and send it on board a ship: the plaintiffs on this sent to know who was to pay for it: the defendant replied, he had sent it and would pay for it. The carriage was sent, and payment required of the defendant: he questioned the price, and refused to pay, but said he had the money to pay it, without explaining whether it was his own or Copey's. Upon these facts, Chief Justice *Eldon*, on the principles of the case of *Williams vs. Leper*, decided that the circumstances took the case out of the statute.

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 TORBERT *vs.* WILSON.
 

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This, it is true, was a trial at *nisi prius*, but it is recognised as sound law. It should be conceded, that some of the adjudged cases, of equal authority, maintain doctrines apparently in conflict with the principles of this decision; but from a comparison of the various decisions on the subject, it is believed the weight of authority fully sustains the conclusions to which I have arrived; and such is the unanimous opinion of the Court.

Judgment reversed, and the cause remanded for further proceedings.

CRENSHAW, J. not sitting.

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 TORBERT *versus* WILSON.

The exemplification of a record, certified by the Clerk of the Court under his private seal, there being no official seal, will be good, and receivable in evidence as though a seal of office were annexed.

In a replication to a plea of the statute of limitation of a former suit, the plaintiff must set out the particulars of such suit, so as to apprise the defendant of what he will have to answer.

It is no answer to the plea of the statute of limitation, that an action had been commenced in another county against the defendant, which action has not been disposed of; and in order to render such fact available against the plea of the statute, it must appear that the former action had been disposed of, before the last was instituted.

Where an action is brought against a defendant in one county, while he is a resident freeholder of another—he must take advantage of such matter of defence, in the action—and if the case proceeds to judgment, he will be foreclosed as to any future defence on that ground.

### Error from Mobile Circuit Court.

This was an action of *assumpsit* to recover the amount of a bill of exchange from Torbert, the plain-



tiff in error. The action was commenced in Mobile Circuit Court on the 22d, January, 1828. Torbert plead the statute of limitations in two pleas—First that he had not undertaken, &c. within six years, and second that the supposed action had not accrued &c, within six years. The plaintiff below replied to the first plea that the defendant did promise in manner and form &c., and to the second, absence from the State, &c. To sustain his replication to the first plea, Wilson offered in evidence the transcript of a record of the Circuit Court of Marengo county, showing that a writ had issued from that Court against the defendant, on the same cause of action on which the present action was brought, on the 14th August 1827. The writ had been returned *non est inventus*, and was followed by an *alias* and *pluries*. The *pluries* was executed on the 14th October 1828 and the suit, as appeared by the transcript, was still pending, when certified by the clerk. The defendant objected to the admission of the transcript to the jury, on the ground that the same was certified by the clerk under his private seal, (there being no seal of office.) The Court overruled the objection—and the defendant then proved that he had been a resident and freeholder of the county of Mobile from the year 1824 down to the time of the trial of the cause. The defendant's counsel requested the Court to charge the jury, that if they believed the defendant was a resident freeholder of Mobile county, at the time the several writs were issued in Marengo county that then he was not liable to be sued in that county; and that the issuance of the writs did not take the case out of the statute. The Court refused to give the charge as thus requested

and the same being excepted to the following grounds were assigned for error, in this Court—

1. That the transcript of the record, from Marengo county, was not properly proven.
2. That if proven, it was, not relevant to the issue.
3. That the residence of the defendant in Mobile was a bar to the applicability of the record.

*Hitchcock*, for Plaintiff—*Acre, contra.*

COLLIER, J.—This is an action of assumpsit upon a bill of exchange, commenced on the 22d January, 1828, in the Circuit Court of Mobile county. The plaintiff in error was defendant below. Among other pleas, the plaintiff pleaded the statute of limitations in two forms—first, that he did not within six years next before the commencement of this action undertake, &c,—second, that the supposed cause of action did not accrue, &c. To the first plea, the defendant replied that the plaintiff did promise in manner and form, as he had declared against him. To the second plea it was replied, that after the cause of action accrued, and within six years next thereafter, and before the commencement of this action, the said James was absent from and beyond the limits of this State, to wit, from the first day of January in the year 1821, until &c.

To support the replication to the first plea of the statute, the defendant offered a paper purporting to be the transcript of a record of the Circuit Court of Marengo county, authenticated by the clerk of that Court under his private seal, he certifying he had no official seal, from which transcript it appears that on

the 14th of August 1827, the defendant caused to be issued from said Court a *Capias ad resp.* for the same cause of action as that for which the present is brought, which was returned *non est*. On the 14th of November 1827 an *alias capias* issued and returned *non est*, and on the 28th of August 1828, a *pluries capias* was issued and returned executed on the 14th of October 1828. It appears from the certificate of the clerk that, that suit was pending on the 26th January 1899, when the transcript was made out. To the admission of this transcript the plaintiff objected, but his objection was overruled and the transcript read to the jury.

The plaintiff also proved that he had been a resident and freeholder of the county of Mobile from the early part of 1824, down to the present time.

The counsel for the plaintiff moved the Court to instruct the jury, if they believed the defendant was a resident and freeholder of the county of Mobile, at the time of issuing the several writs mentioned in the transcript, that then he was not liable to be sued in Marengo, and that the issuing the writ, did not take the case out the statute, which instructions the Court refused to give. This much of the bill of exceptions may serve to make intelligible the view we take of the case.

Two questions are presented for our examination.

1st. Was the transcript from Marengo admissible evidence? This must depend, first, upon the sufficiency of its authentication without an official seal.

2d. Upon the issue under which it was offered, and

3d. Upon its legal effect.

1st In the investigation of this point, we derive no aid from English authority. Their public Courts of record are all provided with seals, so that their decisions furnish no case where an exemplification has been offered in evidence, the verity of which was not attested by an official seal. In this country the state of facts is different, a large number of our Courts have no seals, owing to the neglect of the clerks to procure them or other causes. There is no law, in truth, which makes it obligatory upon them to obtain seals: now, if we were to refuse to receive, as evidence, records certified by the clerks of our Courts, because their authenticity did not appear by an official seal, the burden of proving the subscription of the clerk or the correctness of the copy would be thrown upon the party offering it. This would increase the expense and trouble of litigation, which should certainly not be added to, further than the administration of justice requires. Injury can rarely result from the admissibility of a record, without this additional proof.

The terrors of a criminal prosecution will deter from the introduction of a spurious transcript, and besides, the corrective possessed by the Courts, of awarding new trials, will in general, prevent injury.

But we need not discuss this question as if it was *res integra*. It has been the practice of our Courts since their organization, to receive in evidence transcripts certified as the one before us, and the reasons which would induce a departure must be stronger than any we have been able to discover.

2d. The adaptation of the issue to the proof, is a requisition in pleading of immemorial practice. The chief object to be obtained by pleading, is to advise

the pleader's adversary of the evidence intended to be offered against him. Now, no intimation is given in the replications to either of the pleas, that the writs, issued in Marengo, will be produced on the trial.

In *Coleson vs. Blanton*,<sup>3 Hayw. 157.</sup> it was ruled that the plaintiff must reply special matter, which he insists on in avoidance of the statute. This case is an authority to prove, that under a general replication, the plaintiff cannot give in evidence a subsequent promise, &c. It will not be necessary, however, for us to express an opinion upon the correctness of that decision as prescribing a rule of universal application. It perhaps has its exceptions—but the case before us, we apprehend, does not form one. Whenever the plaintiff proposes to oppose the plea of the statute by proof of a former suit for the same cause, he must give notice by his replication that such proof will be adduced; upon principle, this is clear, and we have been able to find no authority to the contrary.

3d. The solution of the question embraced by this point must depend materially upon the construction of the 10th section of the act "for the limitation of actions and avoiding vexatious law-suits,"<sup>Toul. Dig. 460.</sup> passed 1802, which is as follows: "If in any of the said actions, specified in any of the preceding sections of this act, judgment be given for the plaintiff, and the same be reversed by writ of error; or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, then the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff and not

after." In order to countervail the plea of the statute by the issuance of the writ in Marengo, it would seem that, that suit should have been disposed of before the institution of this. This provision of the statute proposes a benefit to plaintiffs who have been unsuccessful in the prosecution of one action, and cannot, therefore, by any rule of construction be extended to him, who has brought a second action, without awaiting the issue of the first. I have looked industriously, but to no purpose, for adjudications upon analogous statutes, to authorise its extension thus far.

The cases cited by the defendant's counsel, are cases in which the first suit was disposed of, or in which the writ relied on to avoid the statute, was issued in the same suit in which the plea was pleaded; and, therefore, afford no aid in the decision of the present question. The principle upon which it is insisted, that the suit in Marengo prevents the operation of the statute is, that it serves to shew that the defendants have not slumbered upon their rights. This principle supposes that the bar created by the statute, is founded upon the presumption of payment—but the most recent adjudications shew, that this idea is not well founded, else why require an express promise, or an acknowledgment of a subsisting duty, in order to revive a demand already barred? It supposes further that a party by his own act can furnish proof to countervail the presumption of payment—such a principle is opposed to other rules, and is incompatible with the analogies of the law and cannot be well founded.

\*2Bay 194. In *Hopkins vs. McPherson*, *ad' r'* it was determined that a writ taken out, against one of several administra-

tors, will not prevent the statute from running. This is a case directly in point—though the writ was misconceived, and consequently bad, it shews that the plaintiff was not inattentive to his rights.

In *McDowel vs. Goodwyn*,<sup>a</sup> it was held that to sustain a replication of an original sued out, the plaintiff must shew it to have been continued up to the time of the trial. In other words, if the process on which the defendant was brought into Court, did not succeed the writ issued, as an *alias*, &c. it was no answer to a plea of the statute.

The case of *Delaplaine vs. Crowninshield*,<sup>b</sup> also maintains the doctrine, that it is no answer to a plea of the statute, that a writ was sued out before the bar became complete; unless it was regularly continued by *alias*, &c.

To same point, see *Harris vs. Dennis*,<sup>c</sup> *Montgomery vs. Caldwell*,<sup>d</sup> *Canwood vs. Whetcroft*,<sup>e</sup> *Callis vs. Waddy*,<sup>f</sup> *Hume vs. Dickinson*,<sup>g</sup> *Jackson vs. Horton*.<sup>h</sup>

Both upon reason and authority, then, it would seem that the defendant can draw no aid from his suit in Marengo: and because it was unavailing in proof of any fact in issue, the transcript should have been rejected.

Secondly. Was the suit in Marengo a nullity, because the plaintiff was, at the time of its commencement, a resident and freeholder in Mobile county? The determination of the first question being decisive of the case, we might decline its further examination, but as the second is brought up by the bill of exceptions, and an opinion upon it may influence ulterior proceedings between the parties, we will briefly consider it. By our statute, an action instituted in one county, against a resident and freeholder

<sup>a</sup>2 Rep. Con. Ct. 441.

<sup>b</sup>3 Masoh 329.

<sup>c</sup>1 Serg. & Rawle 236.

<sup>d</sup>4 Bibb 305

<sup>e</sup>1 Har. & J. 103

<sup>f</sup>2u nf. 511.

<sup>g</sup>4 Bibb 276.

<sup>h</sup>7 Caine's Rep. 127.

of another, is abateable upon the plea of the defendant; yet it will not of necessity follow, that the suit is a nullity. It may be avoided at the election of the defendant; but if he fails so to elect, and the cause is prosecuted to judgment, the defendant is foreclosed as to his defence, and all proceedings under the judgment are regular. Were it otherwise, the purchase of property, under an execution issued upon it, would not be safe. Hence it will follow, that the suit in Marengo was not a nullity; and it would be competent for the defendant to prosecute a new action within twelve months after the arrest or reversal of a judgment rendered in *that* suit.

Let the judgment be reversed, and the cause be remanded.

CRENSHAW, J. not sitting.

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SHELTON *versus* THE STATE.

Under an indictment charging an assault on the 10th, evidence is admissible of assaults on the 3d and 4th of the same month.

The time of committing an offence, (except where the time enters into the nature of that offence,) may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted.

It is not error that in the prosecution of offences, assistant counsel is assigned the State.

This was an indictment of two counts, in Dallas Circuit Court, for an assault with intent to kill and murder, and for a common assault and battery. On the first count, the prisoner was acquitted. and on



the second convicted, and fined. Two points were reserved on the trial for the determination of the Supreme Court.

First whether the Court below erred in permitting evidence to go to the jury of assaults on the 3d and 4th of March, when the indictment charged that the offence had been committed on the 10th of March.

Second, whether the Court below erred in allowing assistant counsel to the State, who concluded the argument.

*H. G. Perry, and Gordon, for the plaintiff.  
Attorney General, contra.*

WHITE, J.—This was a prosecution at the suit of the State. The indictment contained two counts—one for an assault with intent to kill and murder, and the other for a common assault and battery. On the first, the defendant was acquitted, but convicted on the second, and fined three hundred & ninety dollars. Points were reserved, under the statute, for the determination of the Court; the first of which is whether it was error for the Judge, on the trial, to permit evidence to go to the jury, of an assault on the 3d or 4th of March, when the indictment charged the offence to have been committed on the 10th of that month. The law requires, that some day should be laid in the indictment, but except where the time is of the description of the offence itself, it is sufficient to lay it on any day previous to the finding of the bill, and during the period within which the offence may be prosecuted. In 1st vol. of *Chitty's Criminal Law*, page 224, of margin, these principles are laid down and sustained by many authorities referred to.

Though the allegation of a specific time is important, it is in no case necessary to prove the precise day, or even year, laid in the indictment, except where time enters into the nature of the offence; and, therefore, an overt act of high treason may be proved to be committed on a different day from that mentioned in the indictment. To this doctrine, contained in almost all the books, there can be but one conceivable objection, which is this: that if it be allowable to prove the offence after the time laid in the indictment, subsequent prosecutions for the same offence would not be barred. This arises from a belief, that the record of the first conviction or acquittal, when relied on as a bar, could not be aided by averment. This, however, is a wrong view of the subject.

On the next page of *Chitty*, to that already referred to, the author says, "That in an indictment for high treason, overt acts, committed at different times, may all be laid on the same day; and, therefore, upon a second indictment, the defendant may, by proper averments, shew that he has already been acquitted of the offence, upon the first, though the two indictments allege the offence to have been committed on different days; for it would be hard, indeed, if the prosecutor might vary from the day laid, for the purpose of conviction; and the prisoner could not do the same, in order to shew a previous acquittal."

The next point raised, is, whether the Circuit Court erred, in permitting the argument on the trial to be closed by a different attorney, than the solicitor, for the State. It is argued, that such a practice tends to the abuse of prosecutions, by either making them too rigid and severe, on the one hand. or

opening the door to collusion on the other. If this be so, the State should not be allowed assistant counsel, either to commence or conclude arguments. Now, the fact is well known, that prisoners usually employ men of the strongest talents, and the more important the case, the more distinguished the defending counsel generally are; and if the state is never to be aided in her prosecutions, the contest would often be too unequal for the purposes of justice. Nor can I conceive that much is to be apprehended from a practice that has long prevailed throughout our country. The assisting counsel would be under the control of the Court, and the solicitor a sworn officer, charged with the important trust of public prosecutions, would be guilty of a great dereliction of duty, if he connived at collusions for acquittal, or permitted cruel and unjust prosecutions.

But it is said, that assisting counsel, on the part of the State, should not, at all events, be allowed to conclude the argument; because, the defending counsel, not apprised of the fact, would not lay out their strength to meet the emergency. This, generally, could not be the case; for, in the progress of the cause, and before any thing was said for the accused, there would be notice who was to close the argument. But defendants, if innocent, have never much to apprehend from the laws, as administered in this country, even with the aid of the ablest counsel for the State, and if guilty; it is no public grievance that they should be punished. Here, if any where upon earth, the benign maxim of the law, that it is better ninety-nine guilty persons should escape, than that one innocent man should be punished, prevails in all its force. We can not sustain the

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GREEN et ux. vs. MOORE, EX'R. &c.

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last objection. The point with respect to the continuance, is considered as settled by former adjudications.

There is, then, no error in the record, and the judgment must be affirmed. But we can not render judgment against the security. The law does not require such a bond as the one taken, nor allow this Court to give judgment on it. If good at Common Law, the redress must be sought there.

CRENSHAW, J. not sitting.

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GREEN et ux versus MOORE, EXECUTOR, &c.

A by his last will and testament bequeathed two quarter sections of land to his daughter B. The land had been purchased of the United States, and but one third of the purchase money paid. Held—That A's executor was bound to pay out the balance due to the United States and perfect B's title: on it appearing, that her share, then, would only equal the legacies given off by the said will to A's other children.

This was a bill in chancery filed in Madison Circuit Court, against William Moore the executor of the last will and testament of Uriah Bass. The case presented the following facts. Uriah Bass, by his last will and testament amongst other devises, bequeathed to Ann Green, his daughter, two quarter sections of land. The land in question had been purchased, by Bass, from the United States, and one fourth of the purchase money paid. Uriah Bass died possessed of an estate amply adequate to the payment of all his debts, and to the settlement of all his

bequests. After the executor had qualified, the complainants applied to him to pay out the balance due on the land. This he refused, alleging, that he had no authority so to do, but required the complainants to procure the decree of a competent Court on the subject. The complainants rejecting this requisition, the land became forfeited. This bill was then filed to compel the executor to pay out of the assets in his possession, the balance due on the land, and to secure a patent for the complainants. The answer of the defendant admitted most of the above facts, but contended that he proposed to complainants to take advantage of the law extending further credit ; and insisted on a demurrer to the bill. On a final hearing, the bill was dismissed, and the decree brought to this Court for revision.

*Hutchison, for Plaintiff—Thornton, contra.*

CRENSHAW, J.

In this case, the bill and supplement set forth, that Uriah Bass, by his last will and testament, among other things, devised to his daughter Ann, the wife of John A. Green, two quarter sections of land therein described ; that at public sale the testator had purchased the lands of the United States, at the price of three thousand nine hundred and thirty six dollars, having paid one fourth of the purchase money, leaving three fourths unpaid at the time of his death : that in his will, he directed all his just debts to be paid, and left a large estate amply sufficient to pay debts and legacies and satisfy the devises contained in his will : that the executor William Moore proved the will and took possession of the whole of the personal estate :

that though requested, he failed and neglected to pay the remaining instalments due on the said two quarter sections of land, or to avail himself of further credit under the act of Congress called the relief law, so that the lands became forfeited to the United States. The answer admits the material facts stated in the bill and supplement, but in substance alleges, that the executor requested the complainants to avail themselves of the benefit of said act of Congress, and that if they would procure the decree of a competent Court, compelling him to do so, then he would pay the debt due to the United States; and concludes by insisting on the benefit of a demurrer. On a final hearing on the bill, supplement, answer and exhibits, the Circuit Court dismissed the bill; and this is now assigned for error.

The prayer of the bill is, that the executor may be compelled to re-purchase the land, or to pay an equivalent in money, with compensation for the improvements made by the complainants on the land. Whether the decree of the Circuit Court ought to be reversed and the prayer of the bill be decreed, is now the question for our consideration.

That in the construction of wills the intention of the testator ought to prevail as far as is consistent with the rules of law—that the residuum of the estate and even personal legacies may be taken if necessary, to the perfection of a devise of land—and that it is the duty of the executor out of the personality to pay debts and discharge incumbrances from devises of land, whether the testator's title be in law or equity, are propositions affirmed by the counsel for the appellants, and not denied by the counsel for the appellees.

To arrive at the intention of the testator, as to any given clause of his will, we may resort to other clauses, or to the entire instrument to shew what was intended. If the testator in the present case, intended that the three instalments due to the government on the lands devised to his daughter Ann Green, should be paid out of his estate, it may be ascertained by a resort to this rule. That he intended to do equal justice to each of his daughters by giving them equal portions of his estate is evident from the face of the will. To each of them he has devised two quarter sections of land, and bequeathed to the two eldest, eight negroes a piece, and to each of his five younger daughters a legacy in negroes equal in value to the legacies of the elder daughters. Land of the same quantity and negroes equal in value are evincive to my mind that the testator intended to extend his bounty in an equal degree to all his daughters.

Again; from the face of the will, it does not appear that the testator had not a perfect legal title to the four quarter sections devised to his two eldest daughters, it is fair to presume that he had, until the contrary is shewn to be the fact. We are not informed by the record that the title of Mrs. Sally Green was imperfect, or that her land was incumbered; it is therefore presumable that under the devise to her she has a clear legal title. The lands devised to the five younger daughters necessarily imply a perfect legal title, because the executor is required by the will to purchase those lands for these devisees at a price not exceeding eleven dollars per acre, and which was nearly equal to the price at which the land of Ann Green was originally pur-

chased from the United States. Can it then be supposed consistently with the testator's evident intention of equality in the distribution of his property among his daughters, that he did not intend his daughter Ann Green should also have a perfect legal title to the land which she took under the devise, and that her land should not be paid for out of his estate? that in effect, she should have no land when her elder sister had been provided for, and each of her younger sisters was to have land not exceeding in value three thousand five hundred and twenty dollars. This would be manifest injustice, and to my mind a contrary conclusion is irresistible.

This interpretation of the testator's intention is not only supported by the best rules of reason and justice, but is well sustained by authority, and is entirely consistent with the rules of law. And it is equally true, that it is the duty of the executor to resort to the *residuum* of the estate, and if necessary to personal legacies, for the payment of debts and the discharging of incumbrances on specific devises of land, and for the completion of an imperfect or equeitable title.

In the case of *Livingston vs. Newkirk*, reported in 3d Johns. Ch. Reports, the principle is settled in New York, "that an equitable interest in lands, founded on articles of agreement for the purchase, will pass by a subsequent devise and that the executor must pay the purchase money for the benefit of the devisee."

\* 6 John's  
Ch. Rep.

The case of *Champion vs. Brown*,\* is to the same effect. It was then determined that a contract for the purchase of land did, in equity, descend to the heirs of the vendee as real estate, and who may call on the executor or administrator to discharge the con-



tract, so as to enable the heirs to demand a conveyance from the vendor.

The same doctrine is fully recognised, and well established by the English decisions. In the case of *Perry vs. Phillips*,<sup>a</sup> it was held, that an equitable lien<sup>a1 Ves. Ch. Rep.</sup> was an equitable obligation to do according to conscience, and that a devise of it was good in equity. So, in *Buckmaster vs. Danop*,<sup>b</sup> the same rule was re-<sup>b7 idem.</sup> cognised by the Master of the Rolls; though in that case, the performance of the agreement in favor of the heir, out of the residuary legacy was refused, on the ground that there was no agreement binding on the parties, either in law or equity.—Also, the case of *Broome vs. Monk*,<sup>c</sup> is to the same effect. In that case<sup>c10 idem.</sup> the chancellor held, that a devise of land contracted for, was good, though the devisor had only an equitable estate, and that every devise was specific, and that money, to be laid out in land, should, in equity, be considered as land: though it was also held, that if the contract was not binding, or could not be enforced, nothing would pass by the devise.

All this law, insisted on by the complainants, was admitted by the defendant; but its application to the case in hand was denied.

It was contended, that all the cases referred to, moved on the supposition that the contract could be enforced, and that the remedy was mutual; but that in a sale of public land by the government, payment could not be coerced from the purchaser, nor could the United States be compelled to make titles.

Without admitting or denying this proposition, I think it may with reason be affirmed, that a sale by the government forms an exception to the rule.

It is to be presumed, that a government contract-

ing with its citizens, will act in good faith. It is a matter of history and public notoriety, that a legal title, in pursuance of law, is uniformly granted by the United States to the purchaser or his representatives, on the making of full payment for the land. The prospect or liability of forfeiture, will operate as a means of coercion to compel the purchaser to pay the subsequent instalments as they fall due. It is true, he has his election either to obtain a complete title by making full payment, or to forfeit the money which he has paid, together with his imperfect right to the land. This is a considerable penalty, and must have a good effect in coercing the purchaser to punctuality in payment.

But although the purchaser, in his life-time, might have forfeited the land to the United States, by failing to pay the purchase money as it fell due, yet having devised the land, and died before a forfeiture took place, it is plain, he did not intend it to be forfeited, but intended that it should be paid for out of his estate.

In pursuance of this intention, it was the duty of the executor, to have prevented a forfeiture by an extension of credit under the act of Congress, and ultimately to have completed the payment out of the personal estate of the testator; or, without resorting to an extension of credit, if the condition of the estate would have permitted it without material injury, and a sufficiency of money had been realised, he might have discharged the debt, and perfected the title before a forfeiture accrued.

This was strictly a debt, from the payment of which the executor could not be exonerated without the consent of the devisee, so long as there was a suf-

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GREEN, et ux. vs. MOORE, EX'r, &c.

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ficiency for that purpose, Under the act of Assembly of December, 1816, if the circumstances of the estate required it, by application to the county court, the executor would have been empowered to sell property of the testator in order to complete the payment.

We are all of opinion, that the complainants are entitled to relief in a Court of Equity; that the executor, (or rather the administrator with the will annexed,) for the use of the devisee and her heirs, ought to re-purchase the same land, or other land in the same vicinity, equal in value and quantity, or if this cannot be effected, without material injury to the rights of others interested in the estate, then an equivalent in money ought to be settled on her and her heirs.

But, in as much as the testimony taken in the case was rejected by the Circuit Court, and has not been submitted to the consideration of this Court, and as several material facts are necessary to be ascertained before a final decree can be pronounced, this Court have not sufficient data to render that decree which the Circuit Court should have rendered. To the end, therefore, that all necessary facts may be ascertained, so as to enable the Circuit Court to pronounce a final decree, it is now ordered and decreed by this Court, that the decree be reversed, and the cause remanded, and that the costs be paid out of the testator's estate.

LIPSCOMB, C. J.—PERRY, J. and TAYLOR, J. not sitting.

KENNEDY *versus* MEADOR.

The declarations of a party can not be given in evidence at his own instance, unless they form a part of the *res gesta*.

The opinion of the Court, in this case, shows all the points arising in its decision.

COLLIER, J.—The questions of law, arising in this case, are presented by the bill of exceptions, from which it appears that the defendant in error read to the jury, against the consent of the plaintiff, a deposition, in which a knowledge of several of the facts stated are derived by the witness from third persons. It further appears, that the defendant gave in evidence, declarations of himself and one Roaney, that they were not co-partners at the time the claim on which this suit is founded, originated, and this notwithstanding an objection by the plaintiff's counsel.

We understand by the waiver of the plaintiff's counsel, at the foot of the record, that all objection, as to the regularity of taking the depositions, is waived, and will therefore consider only such objections as are intrinsic.

The deposition, in some of its parts, is clearly objectionable. It details, as facts, matters, a knowledge of which was derived from third persons; and upon motion by the counsel of the plaintiff, it was the duty of the Court to have excluded that portion of it.

It was error to admit the declarations of the defendant or Roaney. The declarations of a party can never be given in evidence at his own instance, unless they form a part of the *res gesta*.<sup>\*</sup> Here, it is

<sup>\*</sup>1 Starkie's  
Ev. 44, 51,  
63, 70.

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not pretended, that there is a *res gestæ* to which they can be referred as a constituent part. The declaration of Roancy was equally inadmissible—it was competent to have examined him on the trial.

Let the judgment be reversed and the cause be remanded.

LIPSCOMB C. J. not sitting.

K. A. P.  
1 sp 221  
94 89

SMITH *versus* MAXWELL.

It appearing, that improper testimony is admitted by a Court to go to a jury, the appellate Court will not presume the proof of circumstances, (not appearing in the bill of exceptions,) which would render such testimony legal. Held not error, that a counsel, with the assent of the Court, had a jury recalled, and an erroneous charge of such Court, in favor of such connection.

This was an action of assumpsit, tried in Morgan County Court.

The bill of exceptions, stated, that on the trial of the cause, the Court below permitted evidence to go to the jury, of the admission of defendant's wife that she had purchased a portion of the goods sued for. Also, that the Court, having given an erroneous charge to the jury, and the same being excepted to by plaintiff's counsel, the jury were recalled, and the charge retracted.

TAYLOR, J.—The assignment of errors in this case, refers exclusively to the bill of exceptions. From this, it appears that the Court below permitted proof to be made before the jury of admissions made

by the wife of Maxwell, of her having purchased some of the articles charged in the account, on which the suit was brought. It is admitted by the counsel for Smith, that this was contrary to the general rule of law, but it is contended that this Court will presume that proof had been made of the wife having acted as the agent of the husband, and if so, the decision below was correct. This would be a most strained presumption indeed. Evidence is received, which is contrary to the general rules of law; there may be circumstances, however, which if proved, would make that evidence admissible; can it be imagined that the Judge would have signed a bill of exceptions in which that evidence was not inserted? If he would, this Court can not supply the omission. From all that appears on the record, the Court erred in admitting this testimony.

It appears that the counsel for the plaintiff in error, excepted to a part of the instructions given by the Court, to the jury, but that after the exception was taken, and the jury had retired, they were recalled and told by the counsel for the defendant, with the assent of the Court, that the instruction was erroneous, and the law different. This is the same as if the Court itself had directed the jury to be recalled to the box, retracted an erroneous, and given a correct charge; therefore, in this, there was no error.

For the admission of the declarations of the wife, the judgment must be reversed, and the cause remanded.

CRENSHAW, J. not sitting.

CARGILL *versus* WALKER.

The vendee of personal property will not be permitted to defend against the consideration of the purchase money, by a mere allegation, that he has been deprived of the property by another, whose title is not shewn to have been superior to his own—and which title he would not defend, because the vendor's agent refused to execute a bond of indemnity.

In error from Dallas Circuit Court.

This was an action of debt instituted by Cargill to recover the amount of a note given for the purchase of a slave; which having been levied on, as of the estate of one Outlaw, it was proposed by the defendant, to the agent of the plaintiff, that if the latter would execute a bond of indemnity, the former would defend the claim; which having been declined, the slave was sold. The defendant having defended against the note on these grounds, obtained a verdict; to reverse which, the cause was brought to this Court.

TAYLOR, J.—By the bill of exceptions it appears, that on the trial in the Circuit Court, it was proved that the consideration of the note, on which the action is founded, was the purchase of a negro by the defendant of the plaintiff, which negro the plaintiff had previously purchased of one Alexander S. Outlaw. It was further proved by the production of the execution, and the return of the sheriff thereon, in connection with his oral testimony, that the said negro was sold after the sale and delivery to the defendant and the execution of the note sued on, to satisfy a judgment creditor of the said Alexander S. Outlaw: that Uriah G. Mitchell was the agent of the plaintiff, who

resided in the State of Mississippi, and that the defendant proposed to the said Mitchell, after the negro was levied on, and before the sale, that if Mitchell would indemnify the defendant, he would claim the negro, make the necessary affidavit, &c. and have a trial of the right of property, as authorised by the statute; but Mitchell refused to give the indemnity required, and the defendant was deprived of the negro by the levy and sale by the sheriff. It was also proved, that there was an express warranty of title made by the plaintiff to the defendant.

"On these facts, the Court instructed the jury, "that if they were of opinion that Mitchell was the "general agent of the plaintiff, and that the negro had "been levied on as it had been testified, and that "the defendant proposed to said Mitchell, if he "would indemnify him, that he would litigate the "right to the negro, at law, and he refused to give "the indemnity, and the negro was sold under the "levy; that the offer to claim upon indemnity being "given, was tantamount to an offer to return the "negro, so far as to permit the deprivation of the "possession of the defendant, of the slave, to be given in evidence in defence of the action. And if "they were of opinion the facts supposed were true, "they should find a verdict for the defendant."

It is undoubtedly true, that the offer made by defendant, to contest the right of the sheriff to sell under the executions, upon receiving indemnity, was equivalent to an offer to return the negro to the plaintiff; but would an offer to return, with the other facts set out in the bill of exceptions, form a defence? It does not appear whether the executions had come to the sheriff's hands before the sale by the plaintiff



to the defendant, nor does it seem that the instructions of the Judge contemplated the case of a lien effected by the executions, but they convey the idea that the assertion of title in Outlaw by the sheriff in making his levy, authorised the defendant to call upon the plaintiff to refund the consideration, and rescind the contract. This certainly is not the law. Had the defendant been sued by a third person, who claimed title to the negro, he might have given notice of the pendency of the action to the plaintiff, and called upon him to make defence, and, in the event of a recovery against him, the judgment would have been evidence in defendant's favor, when sued for the consideration. But suppose upon claim made by this third person, the defendant had given notice to the plaintiff, that if he would indemnify him he would not deliver the negro up without suit, otherwise he would, and indemnity was refused, and the negro delivered up; would this of itself form a defence in an action for the consideration agreed to be paid, without proof of title in the third person? I think not. So here, if the defendant had claimed the property, given bond &c., and upon the trial there had been a recovery, he having given notice to the plaintiff to defend on the trial of the right of property, could have used the judgment in that case in his defence when sued on the note given for the consideration.

Suppose there had been a warranty of soundness, and the defendant, believing the negro to be unsound, had given notice of that fact to the plaintiff and offered to return him; when sued upon the note, proof of this would not have formed a defence, but it would have devolved upon him to satisfy the jury

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EVANS vs. MURPHY, et al.

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by testimony to the fact, that the negro was unsound, and thus have shown a breach of the warranty. The warranty in this case was not against the *claim of title* by another, but against the validity of that title; therefore, without proof that such title was good, no breach of the warranty was shown.

The judgment must be reversed, and the cause remanded.

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EVANS *versus* MURPHY, et. al.

A gave his note for the rent of a ferry, including eighty acres of land: the County Court afterwards granted the ferry to another. In a suit brought to recover the amount of the note—Held—That A could show the failure of consideration, which arose from being deprived of the ferry.

In error from Wilcox Circuit Court.

This action, being assumpsit, was brought to recover the amount of a promissory note. The note was executed by Evans to the defendants in error for the rent of eighty acres of land, including a ferry. The County Court had granted the privilege of keeping the ferry to another individual, whereby the defendant, Evans, had been deprived of its income, which was proved to be worth one hundred and fifty dollars a year. To this defence, the Court charged the jury, that the defendant was bound to pay the whole amount of the note, and that if the land was of any value, they must so find. The defendant, by his counsel, excepted to this charge of the Court, and took his writ of error here.

SAFFOLD, J.—This action was brought in the Circuit Court, by the defendants in error against the present plaintiff, on a promissory note made by the latter, payable to the former, as agents for the Canton Company for one hundred and eighty dollars. The plaintiffs below having obtained a verdict and judgment for the amount of the note, Evans prosecutes this writ of error, and assigns the following causes.

1st. That the Court erred, as shewn in the bill of exceptions.

2d. The Court erred in sustaining the demurrer to the defendant's plea.

In relation to the first assignment, it appears that the note sued on had been given for the rent of a ferry and eighty acres of cleared land; that the County Court had previously licensed E. Pharr to keep said ferry, who kept the same for the whole of the year, for which defendant had rented it, whereby the defendant never received it. Upon this state of facts, the Court charged the jury, that if the land was of any value, the contract was undivided, and they must find for the plaintiff the full amount of the note, the ferry having been proved to be worth one hundred and fifty dollars a year.

The doctrine of *partial* failure of the consideration of contracts, and under what circumstances it constitutes a defence at law to an action brought to recover the price of the article contracted for, is a subject of considerable magnitude, and has often elicited contrariety of decision in different Courts of high authority. Inasmuch, however, as the principles involved in this case have received several recent discussions in this Court, and our opinions have been fully declared upon them, (more particularly in one

\*2Stewart's  
Reports.

case during the present term) it is deemed unnecessary again to review the authorities, or reiterate the reasons by which we are governed. It is sufficient to say, a majority of this Court have heretofore adopted principles of decision in opposition to those maintained by the Circuit Court in this case, and that we are now fully satisfied with them: that on the best reasons and authorities, in cases like the present, the defendant below should be allowed, in mitigation of the demand against him, the benefit of the defence of which he attempted to avail himself; that by this course much delay and vexation, and the circuitry of actions will be avoided, which should ever be regarded as a *desideratum* in the administration of justice. The cases alluded to, as having been already adjudicated, where will be found references to many authorities, and a full exposition of our views are *McMillion vs. Pigg & Marr*,\* and *Peden v. Moore*, page 71 of this volume.

Respecting the 2d assignment, as it is unimportant to the decision, it is sufficient to say no error is presented by it. On the first the judgment is reversed, and the cause remanded.

LONG *versus* LEWIS, use, &c.

It is not competent for a Court of Law, on motion, to order the sheriff to retain, out of money collected for a plaintiff, the charges of an attorney for *commission*, or *compensation for extra services*—not being costs or taxed fees.

In error from Madison County Court.

So much of this case as involves the point decided, shows that Lewis for the use of Sanders, moved the County Court of Madison county, for an order directing the sheriff to retain certain fees charged by him as attorney for Long, out of money then in the sheriff's hands, belonging to the plaintiff in error. Lewis had managed several suits for Long, in the Inferior and Supreme Courts, and the motion was predicated on a claim for *extra compensation*, being no part of the taxable fees. On a final hearing, the Court gave judgment on the motion, without the intervention of a jury, and this, with many other errors which appear in the opinion of the Court, were assigned for its reversal.

SAFFOLD, J.—At February term, 1828, of Madison County Court, Lewis, for Sanders' use, moved the Court to order the sheriff to detain, out of the amount of the execution in the case of *Long vs. McBroom*, former sheriff, the fees claimed by Lewis as attorney for Long, in the case of the *latter vs. Turner* in that Court; in which there had been an affirmance of judgment in the Supreme Court, and for satisfaction of part whereof the judgment against McBroom had been obtained. The fees claimed were for obtaining the affirmance of said judgment. The Court

continued the motion, but ordered the sheriff to *detain* two hundred and fifty dollars, until judgment on the motion, unless Long should give bond to Lewis for Sanders' use, with condition to pay the two hundred and fifty dollars, or what should be adjudged on the motion.

At August term, 1829, on the hearing of the motion, Long's attorney insisted, there should be a declaration, or statement of the facts on which judgment was sought, but the Court refused to compel it, to which Long excepted.

The facts having been suggested, on which, in pursuance of the motion judgment was sought. Long controverted them, and prayed a jury to determine them; this request, the Court also refused, and to which a further exception was taken.

It was conceded, that the fees claimed, formed no part of the costs taxed, or which could be taxed or embraced by the judgments, (*Long vs. Turner*.) but were one moiety of the damages of affirmance in those two cases claimed by Lewis, as Long's attorney, for obtaining the same, without any express contract betwixt him and Long. Therefore, Long insisted, the Court could not take jurisdiction, but the Court proceeded to hear and adjudge; and to this exception was also taken.

The facts proved were, that Lewis, as Long's attorney, obtained two judgments against Turner, for two thousand four hundred and seventeen dollars. and two thousand three hundred and thirteen dollars—writs of error were prosecuted, and at December term 1823, of the Supreme Court, J. M. Taylor, Esq. for Lewis, obtained affirmances with ten per cent. damages according to statute. a moiety of which

damages was one hundred and seventy-seven dollars and eighty one cents. Executions on the affirmed judgments were returned to January term 1825, "satisfied."

On the 25th August 1826, Sanders filed his bill in Madison Circuit Court, against Lewis, Long and McBroom, claiming Lewis' fees as his assignee, being the sum of one hundred and seventy seven dollars eighty one cents, aforesaid, and praying an injunction and decree for the same. Lewis' answer, admitted the transfer to Sanders and his right, stated his contract with Long to have been a written one, allowing him two and a half per cent. on the amount he should collect and receive, and which had been paid him; that there had been no further stipulation, but that writs of error were not contemplated, and relied on the practice for an additional fee of one half of the damages on the affirmance of the judgments. At November Term, 1827, the bill was *dismissed*. For what reason, or on what ground, the bill was dismissed, does not appear. The facts respecting the bill, were given in evidence by Long, in defence of the motion, to avail himself of Lewis' answer, which admitted he *was to make the collection for two and a half per cent. and that he had received the same &c.* Lewis' receipt for the two and a half per cent. was also produced; and it was further proved, that after the affirmances, Long collected from the sheriff about two thousand dollars; that his agent made repeated visits from Tennessee, in order to get the residue out of the hands of Sanders, the deputy of McBroom, and from first to last Lewis was absent, having removed; that for the want of his original attorney, he was under the necessity of em-

ploying and paying another attorney, (Mr. Craighead,) who obtained the judgment against McBroom, for about one thousand four hundred dollars, the residue collected by Sanders.

The Court also heard proof of the custom of the Northern bar, in support of the charge of half the damages of affirmance, &c., to which objection was also made.

The judgment of the County Court was that the restraining order be rescinded. That Lewis for Sanders' use recover of Neal, sheriff, one hundred and seventy seven dollars and eighty one cents for Lewis' services &c., out of which the costs were to be paid; and that the balance of the said two hundred and fifty dollars, being seventy two dollars, nineteen cents be paid to Long: and for said sums executions were awarded.

It may be premised respecting the bill filed by Sanders against Lewis, Long and McBroom, the proceedings thereon and its dismissal; that in as much as the principles or grounds of the decision in chancery, were not made a part of this record, and do not appear to have been relied on as a bar to the success of this motion; as the bill may have been dismissed on the ground that it involved a subject exclusively of Common Law cognizance, and the effect of the decree is not assigned as any cause of error in this Court, the chancery decision can have no material influence in the determination of this case.

But it is assigned for error that the restraining order was irregular—that the refusal of the Court to compel a statement or declaration of the cause of action; and to allow the plaintiff in error the benefit of a trial by jury was illegal. Also, that it was er-



ronous to entertain summary jurisdiction, to receive the evidence of the usage of the bar; and to give the judgment in question.

The facts of the case, together with the assignments of error, present the question, whether or not it is competent for a Court of law, on motion against the sheriff, and without the intervention of a jury to order the sheriff to detain from the plaintiff, money collected on executions in his favour and pay the same to his attorney in satisfaction of his claim of *commission*, or, *compensation for extra services* in effecting the recovery? And if the competency exists under different circumstances, do not the facts that no specific rate of commission had been agreed on—that the services relied on as the ground of the claim were contested, by the client, and negligence imputed to the attorney—the necessity in this case of deciding the amount due, or whether any thing, from evidence *in pais*, and the defendant's claim of the right of trial by jury, destroy the competency, and deny the summary remedy?

It is material that the claim was not for costs, or any fees that were, or could have been taxed in the bill of costs, or which were in any manner defined by law—such would stand on a different principle; the demand was for additional commissions for extra services by the attorney, for procuring an affirmance of the judgments in this Court; and this after being paid for his services in the Court below, the stipulated rate (two and a half per cent commissions,) for making the collection. There had been no further stipulation, writs of error not having been contemplated at the time of the engagement; but the same having been prosecuted, the attorney relied on the

practice and usage of the bar to give him an additional fee of one half of the damages accruing on the affirmation.

As respects the fact of the attorney having been employed in the service for which he claims compensation, and so far as that may be material, it is sufficient to remark that it is not necessary the attorney should be able to prove the original employment; if he can show a recognition of him, by his client, as attorney in the progress of the suit, it is sufficient, <sup>9</sup>Johns. R. 142. *Hotchkiss vs. Le Roy.*\* Nor should I doubt but a continuation of the employment in the defence of a writ of error, and an agreement for extra services, may be implied in a proper case, by a competent tribunal, from the necessity of the service, and the usage of the country. But to do this the tribunal must have authority to draw inferences and decide contested facts.

It is also a rule of law, that if the defendant pay to the plaintiff his debt and costs, after notice from the plaintiff's attorney not to do so, he pays the costs in his own wrong—*Pindar vs. Morris,*<sup>3</sup> *Martin vs. Hawks.*<sup>5</sup> But this has reference alone to the expenses which by law may be taxed in the bill of costs in favor of the successful party; and is by legal intentment for the benefit of his attorney, and is said to be his measure of compensation, as between him and the party recovering,—*McFarland vs. Crary.*<sup>4</sup> <sup>3</sup>Caine's R. 165. <sup>5</sup>15 Johns. R. 405. <sup>4</sup>8 Cowen 253.

Another established principle, and one more applicable to the case before us is, that the claim which an attorney may have on his client for extra services, or for counsel fees, make no part of the attorney's lien upon the taxed costs, or which the Court will protect against the interference of his client—*The People vs. Hardenburg.*<sup>8</sup> <sup>8</sup>Johns. R. 335.

That "the right of trial by jury shall be preserved," or "shall remain inviolate," is a sacred constitutional guarantee, none will, in terms, deny; the only question is as to its application. By the constitution of the United States it is expressly applied to all "suits at Common Law, where the value in controversy exceeds twenty dollars." By adopting, substantially, the same language, the convention in this State must be presumed to have intended the same degree of protection. In obedience to this *two fold* constitutional rule, this Court, as well as most others in the Union, has repeatedly decided that in summary proceedings, no less than in a different mode, against officers and others, where material facts *in pais* are controverted, and in cases of sufficient amount, the benefit of trial by jury can not be withheld. Believing in this case, that this right has been violated, we consequently decide that the County Court erred.

Admitting the principle that an attorney at law, who has collected and received into his hands money for his client, has a right to retain therefrom any amount of fees, or commissions justly due him for his services in the same case; or if the principle be so extended as to recognise a *lien* in favour of the attorney on the evidences of debt or demand for the prosecution of which he has been retained, until his fees are paid; it does not follow, that, under different circumstances, he can, by *mere motion* to the Court, obtain an order, decree or judgment for the amount, against his client, or any other person, or officer, who may hold the money—nor can he place his assignee in a more favorable attitude. If the attorney have possession of the money collected, or the

evidences of the debt, and the client demands the same, but his attorney refuses, insisting on his right to retain in satisfaction of his fees, or until the same are paid, the client can litigate the right by motion or regular suit, according to the circumstances; if material facts be contested which the Judge is incompetent to decide, an issue may be formed and the facts ascertained by a jury. If the attorney have not the remedy in his own hands, in relation to his claim of commissions or fees, beyond those chargeable in the bill of costs, and his right be contested by his client and payment refused, or if for other cause, it is delayed, the Courts are open to him, and he is entitled to the same remedy, by regular suit, that other creditors may demand.

I would not be understood to say that no remedy exists by which an attorney, or his assignee, can secure his commission, or retaining fee, out of the money collected, and in the hands of the sheriff, or other person, against his client's consent; but if it be admitted, (on which however we express no opinion,) that the remedy exists, in case of the insolvency of the client, or where artifice or fraud has been resorted to with a view to defeat the attorney's claim, it must be by suit in chancery, or at law in the ordinary course: whereby the client shall not be denied a trial by jury, of the contested facts, nor be compelled to have his rights determined by a proceeding against an officer who may have neither inclination or ability to defend them.

Let the judgment and proceedings be reversed.

COLLIER, J.—I concur in reversing the judgment, but dissent from so much of the opinion of the Court

## HUDSON vs. TINDALL, EX'R.

as supposes that the decree in the chancery cause was not a bar to further litigation in regard to the subject matter. It may be true that the bill contained no equity, and should for that cause have been dismissed, but the question is not what should have been done, but what was done. The bill having been dismissed generally, we must understand that the merits of the case were litigated and determined; and hence the decree precludes further controversy in another form.

HUDSON *versus* TINDALL, EX'R.

Where a defendant produces an assigned note of the plaintiff, as a set-off against the plaintiff's action, the latter may show a *total or partial* failure of the consideration for which the note was given, either by a replication to the *plea of set-off*, or in answer to the *general issue*, and *notice of set-off*.

Hudson brought an action of assumpsit, in Tuscaloosa County Court, against Tindall, the executor of Payne, to recover for work and labor. Tindall filed the plea of general issue, and a notice of set-off. In support of the set-off, the defendant produced a note of hand, executed by the plaintiff, to one Lewis Hudson, and by the latter endorsed in blank. The plaintiff moved the Court to exclude this note from the jury; which being refused, the plaintiff then offered evidence to show a total failure of the consideration, for which the said note was given. The Court rejected this evidence, and the two decisions of the Court below, were here assigned for ever.

*Crabb*, for plaintiff—*Ellis*, *contra*.

SAFFOLD, J.—The action in the Court below, was assumpsit for work and labor, &c. by the present plaintiff, against the defendant as executor of Payne. The plea was the general issue, accompanied by a notice of set-off. To support the set-off, as appears by the bill of exceptions, the defendant offered in evidence a note for one hundred and forty-four dollars, made by John Hudson, the plaintiff, payable to Lewis Hudson, and endorsed with an assignment as follows: "I sign the within, for value received, Feb. 16th, 1826—Lewis Hudson." This date was anterior to the maturity of the note, and the note fell due sometime before the commencement of this suit. To the admissibility of this evidence, the plaintiff objected, and moved the Court to exclude it. The Court overruled the motion, and permitted the evidence to go to the jury. Afterwards, in the progress of the trial, the plaintiff proposed to introduce evidence of a total failure of the consideration of the said note, which being objected to on the part of the defendant, was refused by the Court, to which decisions the plaintiff excepted.

The jury rendered a verdict in favor of the defendant; and certified that the plaintiff was indebted to the defendant, the sum of one hundred and forty dollars and seven cents; on which the Court rendered judgment, that the plaintiff should recover nothing, &c. and that the defendant recover his costs, &c. and that a *sci. fa.* issue in favor of the defendant—which having issued accordingly, the plaintiff, (then defendant) in the *sci. fa.* demurred, and was overruled; and upon motion of the plaintiff, in the *sci. fa.* the Court rendered judgment that the conditional judgment of the previous term, be then made final, &c.

The original and present plaintiff, having sued out this writ of error, assigns as causes, among others—

1. That the Court below, in the progress of the trial, permitted the *note assigned or endorsed*, as stated, to go to the jury, as evidence of set-off.

2. That the Court refused to permit the plaintiff, on the trial below, to introduce evidence of a *total failure* of the consideration of the note offered as a set-off, under the general issue and notice.

3. That the Court rendered judgment, for the defendant below, that *sci. fa.* issued upon the certificate of the jury.

1. The record does not state any specific objection as having been urged against the admissibility of the note as evidence. The objection appears to have been general. But in this Court, it is insisted, that there ought to have been proof of the execution of the note by the plaintiff, of the genuineness of the assignment, and that it was made at the time it bears date, or, at any rate, before the institution of the suit; that it should also appear whether it was assigned to the testator, or to the defendant as his executor; and further, that it was inadmissible for the reason that when given in evidence, the assignment remained *blank* as to the assignee. Which of these specific objections, or whether either, was brought to the notice of the Court below, does not appear. It may be, (as insisted by the defendant's counsel) that the decision of the Court was never required on either—that some different and untenable objection alone was made. Admitting, if the objection was made, that the note was inadmissible without proof of its execution, and that the assignment was made before the institution of the suit, yet it may be that the plaintiff,

tacitly or impliedly, waived the necessity of it—the same may be said respecting the necessity of filling the endorsement with the name of the assignee, and any other particular objection that might have been taken

Respecting the necessity of offering proof of the hand writing of the endorser supposing the exceptions to have been sufficiently taken, I am of opinion that no such proof could legally have been required, unless the genuineness of the assignment had been put in issue in the manner prescribed by the statute. The language of the statute is, "that when any suit shall be instituted, by any person or persons, as assignee or assignees, of any bond or other writing, it shall not be necessary for the plaintiff or plaintiffs to prove the assignment or assignments, unless the defendant or defendants shall annex to the plea denying such assignment or assignments, an affidavit stating that such defendant or defendants verily believe that some one or more of such assignments was forged, or make oath to the same effect in open Court, at the time of filing such plea." Here under the general issue, notice had been given to the plaintiff that the note (describing it) would be offered as a set-off. This was entirely equal to a special plea, containing the same matter. It apprised the plaintiff as fully as a declaration could have done, of the claim which he was required to admit or resist—in other words to *defend*.

\* Dig. 189.

In relation to this note, the situation of the parties were substantially changed, the plaintiff was virtually and technically *sued* on the note by the defendant—the former would not deny the assignment on oath, according to his belief, and which only is re-



quired by the statute in any case. The injury or inconvenience would, in most cases, be the same whether the proof be required from the plaintiff or defendant, to avoid which must have been the intention of the legislature. I think the *spirit* and *equity* of the statute apply equally to endorsements on a note when offered as a *set-off*; but as a different decision has been made during the present term of this Court, (*Cass vs. Northrop*,) I will not further meet the question. And for reason of the uncertainty of the exceptions referable to this assignment, and because the next is sufficient to dispose of the case, the Court declines the expression of any definite opinion on this.

2. Was the evidence of the failure of the consideration of the note properly rejected? If it was, it can be alone on the principle that the right of resistance or defence, was greatly restricted from the circumstance that the remedy on the note was prosecuted in the form of a *set-off* instead of an *original action*. The doctrine is, that under the *general issue*, the defendant may give in evidence the *insufficiency* or *illegality* of the *consideration*, *infancy*, *lunacy* or *coverture*, at the time of contracting; and a variety of other matters, which in effect admit that a contract was made, but deny that it was, or is, obligatory on the defendant.\* Suppose the relation of the parties changed, and that the note had been made the foundation of an original suit by Tindall against the maker, then the defendant would, under the *general issue*, have been clearly entitled to the benefit of the total failure of the consideration; can the mere change, in the form of the remedy, vary the rights of the parties, or the law of the contract? The statute provides, "that in all

\*1 Chit. P.  
470, 1—T.  
Pr. 591

Ark. D. 69

actions to be commenced on any assigned bonds, promissory note, &c. the defendant shall be allowed the benefit of all payments, discounts and sets-off, made, had, or possessed against the same previous to notice of the assignment, any law, &c. to the contrary notwithstanding."

\*2 Stewarts  
Rep. 1.

The decision of this Court, in the case of *Baldwin* vs. *Brogden*,\* would appear to countenance the rule adopted by the inferior Court in this case. It was there held, that where a defendant pleads as a set-off, a note made by the plaintiff to another person, and transferred to him, the plaintiff will not be permitted to prove such set-off void, as being given for a gambling consideration, without replying such defence specially.

In support of this decision but little reasoning is employed, nor is any authority cited. The case was, at least, nominally different from this; there the set-off was specially pleaded—here, it was offered under the general issue and notice. It is suggested that the Court, in the former case, (and which consisted of but a bare quorum,) conceive that the difference in the form of the issue, authorised a different rule of decision, such as they adopted. Whatever may have been the views of the Court at that time, the present Court are unanimous in the opinion, that the evidence offered by the plaintiff to impeach the consideration of the note introduced as a set-off, was admissible; and that in the rejection of it, the Court erred; and that on the authority of recent decisions of this Court, and the references therein made, the evidence would have been equally admissible, if offered to establish only a *partial* failure of consideration. And my own opinion is, that the defence against the note was alike

available, whether the note had been given in evidence under a plea of *set-off*, or the *general issue and notice*; that in neither case was a special replication necessary. In this opinion, probably a majority of the present Court would concur.

3. It is believed to have been unnecessary and irregular for the Court below, to render any judgment or order for the issuance of a *sci. fa.* on the certificate of the jury in favor of the defendant. The amount certified stood as a debt of record, on which, without further authority, the defendant was by the statute of defalcation, in force at the commencement of the suit (and which governed the case,) authorised to take out a *sci. fa.* unless the debt was paid without delay. Whether the judgment, or order, for the *sci. fa.* should only be regarded as surplusage, not vitiating the judgment, or otherwise, is unimportant to this decision, as the law, in this respect has been modified by an act of 1827, '28, which will govern subsequent suits; and as the previous assignment is considered fatal to this judgment.

Other causes have been assigned for error, one of which, being for matter beneficial to the plaintiff, he can claim no advantage from it. The others relate to the proceedings and judgment on the *sci. fa.* which we regard as a distinct suit and not subject to revision on this writ of error.

On the second assignment alone, let the judgment be reversed, and the cause be remanded.

MARTIN & HILL *versus* WOODALL.

A paper, promising to pay a certain sum of money for staves, (subject to a deduction for any number not procured,) at two dollars a thousand—held not subject to the same rules of decision which regulate *promissory notes*; so as to authorise the Court to give judgment on it without the intervention of a jury.

In an action on such a paper, it is essential to aver in the declaration, the number of staves actually procured.

This was assumpsit, brought in Dallas Circuit Court, to recover of the plaintiffs in error, the sum of one hundred dollars. The instrument, on which the action was founded, was in the following words, to-wit: "We promise to pay Jesse Beene one hundred dollars for fifty thousand staves, which we have liberty to get off his land, at the mouth of Cedar creek. Dallas county, subject to a deduction for any number we may not get, at two dollars a thousand."

This cause of action was declared on, as a common promissory note: and the declaration contained no averment of the number of staves actually procured by the defendants. The Court below suffered a judgment final by default to be rendered, and it was here assigned for error.

First—that the Court erred in giving a judgment final by default, without the intervention of a jury.

Second—that the declaration was defective, in not containing an averment of the number of staves actually taken by the defendants.

WHITE, J.—The following are the words of the instrument on which this action was founded:—"We promise to pay Jesse Beene, one hundred dollars for

fifty thousand staves, which we have liberty to get off his land at the mouth of Cedar Creek, Dallas county, subject to a deduction for any number we may not get, at two dollars a thousand." The declaration is in the form, usual, on promissory notes, containing no averment of the number of staves actually got—a judgment by default final, was taken in the Court below, and it is here assigned for error.

1. That the Court erred in giving final judgment, without the intervention of a jury.

2. That the declaration is defective in not averring the number of staves actually taken by the plaintiffs in error. For the defendant, in this Court, it is contended, that the instrument sued on, though not a promissory note by the law Merchant, technically speaking, yet by the provisions of the statute of 1812, it is in effect one, due presently, and that if the staves were not got, it was purely a matter of defence to be pleaded, as any other failure of consideration. As to the intervention of a jury, it is insisted that the judgment by default confessed a cause of action for the full amount, and therefore, that there was no necessity for a jury to assess damages. A very slight examination into the intention of the parties to this contract, and the legal effect of the contract itself, will enable us to see whether the errors assigned are well taken. To my mind, it imports nothing more than an agreement that Martin & Hill should be permitted to get staves off the land of Beene to any amount not exceeding fifty thousand, for which they were to pay at the rate of two dollars a thousand. True, they promised to pay one hundred dollars, and this, if taken independently of the contingency, stated in the writing, would bind them to pay that sum

immediately. But in as much as they, in effect, only promised to pay at a specified rate, for the staves which they should afterwards get, they were not bound to pay a cent until they had got some of the staves, and then only in proportion to the number received. It was therefore indispensable to aver what staves they had got. Without this, the declaration did not contain a substantial cause of action, and could not be good even under the extensive provisions of the act of 1824. But if necessary to aver, it was equally so, to prove this fact, otherwise it did not appear what sum should have been recovered, and the judgment by default could not legally be rendered for more than nominal damages. As then, the writing itself did not furnish data from which to ascertain the amount, but other proof was needed, a jury should have intervened. We are, then, of opinion, that for the two errors relied on, the judgment must be reversed, to the writ, and the cause remanded.

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MASTERTON, et al. *vs.* BEASLEY, et al.

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MASTERTON, et al. *versus* BEASLEY, et al.

A judgment by default, before filing a declaration, is error.

PERRY, J.—The record, in this case, shews, that the plaintiff in the Court below, before he filed his declaration, took a judgment by default, against the defendants, which judgment is said to be erroneous, and it has been so held by repeated decisions of this Court.

The judgment must, therefore, be reversed back to the writ, and the cause remanded.





# CASES.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA;

JANUARY TERM, 1832.

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TAYLOR *versus* BRANCH.

Under an averment in a declaration, "that the instrument was duly presented to the maker thereof," the plaintiff may shew in evidence, that the party was diligently sought and could not be found; and it is not essential to aver the latter facts specially.

In error from Lawrence Circuit Court.

In this case Taylor commenced an action of assumpsit against Branch, as endorser of a bond, which had been executed by one Campbell. The declaration averred, "that the instrument had been duly presented for payment," &c. and the evidence disclosed that the demand was not personal on Campbell, but had been made at his late residence a day or two after he had left it. The defendant by his counsel moved the Court to instruct the jury, that a demand, at the last residence of Campbell, did not

sustain the averment, which charge having been given, the same was excepted to as error.

SAFFOLD, J.—The action was assumpsit, in the Circuit Court, brought by the present plaintiff, as endorsee of a bond against the defendant as endorser. The declaration is in the usual form; charging, with other averments, that "the said writing was duly presented and shewn to said Campbell (the maker) for payment," &c.

During the trial a bill of exceptions was taken by the plaintiff. So much of which, as is material, states that at the proper time for presentment of the bond the agent of the plaintiff, having the bond in possession, called at the house of A. P., the late residence of said Campbell, in the town of Tuscaloosa, from which said Campbell had gone a few days previous, and at that time inquired of A. P. if Campbell was at his house, and was answered that he had left there a day or two before; the agent for plaintiff then presented to A. P. the bond, informed him of the contents and endorsement, and demanded of him payment thereof, which was refused.

On this evidence the defendant's attorney moved the Court to instruct the jury that a demand and refusal, at the last residence of Campbell, as above proved, would not support the declaration, and they must find for the defendant upon the evidence before them; which instructions were accordingly given.

This charge of the Court is assigned as the cause of error.

Thus the question arises, whether, as presentment of the bond was not in fact personally made on the obligor, was the plaintiff required in his declara-

tion to aver the facts specially, which constitute his excuse for not having done so; or was it sufficient, as the plaintiff has done, to aver generally, that the writing was duly presented and shewn to the maker for payment, and under this averment to prove the circumstances?

It is said in *Chitty on bills* 495, note i, on the authority of *Carth.* 509, and *Bayl.* 109, that the allegations should correspond precisely with the facts and evidence; and where a declaration avers, in the usual form, a presentment for acceptance or payment, and refusal, the plaintiff can not give in evidence that the drawer or maker can not be found; but that if he can not be found it is sufficient to aver, generally, that he was not found, without stating that inquiry was made after him.

A similar doctrine is also recognized in 2d *Starkie's Ev.* 255, on the authority of *Bayl.* He states, "that an allegation of due presentment, and a refusal to pay, will not be satisfied by evidence that the maker or acceptor could not be found when the note or bill was due."

The Supreme Court of New York *Stewart vs. Eden*,<sup>2Cain.125</sup> has, however, maintained a different doctrine. That was an action by endorsees against the executors of the payee, the endorser—like this the declaration was in the usual form, stating a demand on the makers, their refusal to pay &c. There the note was presented at the store of the makers, but no person being there, the porter, who demanded payment, went into an upper room, where he was informed that the makers were out of town, but that a young man opposite was their clerk. The note being presented to him, he said instructions to pay it had not been left.

*Livingston J.* in delivering the opinion of the Court, observed, that in such case the declaration might state the facts specially, or make the general allegation "that the note was presented and payment refused," but it had been most usual to pursue the latter course, and no good reason could be assigned for departing from it—that the precedents are generally in this way, and if in some, the whole matter intended to be insisted on as evidence of a demand be set forth, it only proves that either course is good.<sup>1</sup> He cited the case of *Sanderson and others vs. Judge*,<sup>2</sup> where the defendant, having absconded, could not be found, and no demand was made on him; yet the declaration stated that the note had been presented to him for payment—the facts were held good and sufficient evidence to support the averment. He dissented from the contrary doctrine as contained in *Bayly on Bills*, 110, as a *nisi prius* decision, which is inconsistent with the better and more uniform practice, since the introduction into general use of bills of exchange and promissory notes.

No doubt is entertained, nor is the doctrine contested in this case, but that the circumstances given in evidence were sufficient to excuse the non-presentation to the maker in person: that similar circumstances are sufficient to excuse a personal demand is well established by many authorities.<sup>3</sup>

<sup>1</sup> 4 Mass. R.  
45—2 John  
R. 274—9  
Wheat. 508

We also hold as a general proposition that it is sufficient to describe a cause of action according to the legal effect; and on this principle, and the authorities referred to, we are of opinion that the evidence was sufficient to sustain the declaration, and that in giving the contrary instructions the Circuit Court erred; for which the judgment must be reversed and the cause remanded.

JAMESON vs. COLBURN.

JAMESON *versus* COLBURN.

In order to bring a cause into the appellate Court by error, all the parties must join in the writ—and it is competent for one to use the name of his co-defendant, without his consent.

This was a motion to compel Evans, one of the co-defendants below, to join in error.

COLLIER, J.—In order to bring a case into the Court, all the parties must join in the writ of error, else it will be quashed, or the case dismissed at the mere motion of the Court.—*Phelps vs. Ellsworth*,<sup>a</sup> *Callaghan vs. Carr*.<sup>b</sup>

<sup>a</sup>3 Day's  
Cases 144.  
<sup>b</sup>1 Marshal

It is competent for one, who considers himself aggrieved by a judgment against him, to use the name of his co-defendants in prosecuting a writ of error, without first obtaining their consent; and if, upon the cause coming into the appellate Court, either of the plaintiffs in error decline joining in the assignment of errors, he should be summoned, and on failure to join, be severed, and the writ prosecuted by the other plaintiffs separately.—*Bradshaw, et al. vs Callaghan, et ux.*<sup>c</sup>

<sup>c</sup>2 Sellon's  
Prac. 404  
<sup>d</sup>Johns.R.  
558.

The Court, therefore, directs that the summons issue, unless Evans dispense with it, by express waiver.

MOORE *versus* LEFTWITCH.

Where one in a suit at law, offers in evidence, as a whole, the record and proceedings of a chancery cause, between the same parties to the suit.—consisting in part of his own answer, and the depositions of witnesses, such record is not admissible as testimony.

In error from Lauderdale Circuit Court.

This was an action of assumpsit, and was founded on an agreement in writing. The jury found for the defendant, and the only point of revision here insisted on, is whether the court below erred in rejecting, as testimony, the record and proceedings of a chancery suit, previously decided, between the same parties. The record was produced under the general issue, and was offered as a whole, without separating the *decree* from the answer or proofs.

TAYLOR, J.—This action was brought by the Leftwichs' against Moore, on an agreement in writing, entered into between the parties, by which Moore leased to the Leftwichs', for one year, certain salt-works, and agreed that he would furnish for the use of said works a sufficient quantity of water metal, for the use of the furnace, &c.; for which the Leftwichs' agreed to pay one hundred dollars per month, one half at the end of three months from the date of the lease, and the remainder at the end of the term. Several breaches, on the part of the lessee, are averred in the declaration, the general issue pleaded, and a verdict was rendered against the defendant below for three hundred and fifty dollars.

On the trial, exceptions were taken to the opinion of the Court; and the only point now insisted on by

the plaintiffs in error, is, that the Court erred in not permitting "the defendant below, to read in evidence the record and proceedings of the same Court, in a case previously decided on the chancery side of the Court, wherein said Littlebury Leftwich was complainant, and said Samuel Moore, and one Richard Bandy, defendants."

A copy of the record and proceedings which were rejected, is inserted in the bill of exceptions; and it appears that Bandy, as assignee of Moore, had instituted a suit at law, and recovered a judgment in the same Court, against Littlebury Leftwich, for the amount of rent specified in the agreement. That after the recovery of the judgment, Littlebury Leftwich had filed a bill against Moore and Bandy, without making Joel Leftwich his co-partner, a party, in which bill he alleged the same breaches of the contract by Moore, which are averred in the declaration in the case under consideration; that Moore was a non-resident and insolvent; and prayed and obtained an injunction, staying further proceedings on the judgment recovered by Bandy against him. On final hearing upon the bill, answers and proof, the injunction was dissolved, and the bill dismissed. In the decree dismissing the bill, the chancellor expressed the opinion, that it contained no equity, and that if it did, the complainant's proof was insufficient to authorise a recovery—the defendants, in their answers having denied all the material allegations of the bill. It is contended for the defendants in error, that "the record and proceedings" in the chancery suit were correctly rejected—that for several reasons they were not competent testimony. I deem it necessary to examine only one of them, as on this ground

the Court are unanimously of opinion they were properly excluded: that is, that even if it be admitted the *decree* was competent testimony, many other parts of the record and proceedings which were offered, were not.

I shall not examine the question whether the decree, if offered alone, or in connexion with only such parts of the record as were necessary to explain it, would have been competent, but whether the Circuit Court erred in the decision which it made.

The rule is clearly established, that to make a judgment or decree conclusive evidence, it must be pleaded as an estoppel; when introduced under the general issue, it may be rebutted, because it is only persuasive evidence. It is important then, when offered under the general issue, that nothing should accompany it which is incompetent, and which would probably have an influence upon the mind of the jury in increasing the effect which the evidence that is competent would have upon them.

In this case the plea was the general issue, the decree in chancery, if admissible, could only be received as *prima facie* evidence. The record and proceeding offered by the defendant below, and rejected by the Court, included the defendant's answer and the depositions of sundry witnesses. These depositions were not competent testimony in this suit. In a Court of law the witnesses, if living within the jurisdiction of the Court, must be examined in open Court to enable the opposite party to cross examine in the presence of the jury. This right the Court had no power to deprive the opposite party of. Still stronger are the objections to the answer. By reading it to the jury Moore would have been made a



witness for himself, a witness too who could not have been cross examined when his testimony was given, as his answer is altogether his own act. It is evident therefore, that in offering to read the record and proceedings, in the chancery suit to the jury, the defendant's counsel offered much incompetent testimony, and it was not the duty of the Court to separate the good from the bad, and say to the party *this* part is legal evidence, but *that* is not. It might have done so, but it was the duty of the counsel to see that he included nothing illegal in that which he offered as one piece of testimony.

In the case of *Elliott et al. v. Peirsol, et al.* this doctrine is clearly sustained. In that case the Court say: "It is conceded that the defendant's counsel had a right to move the Court below, to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent; but it is not admitted that he exercised that right. It does not appear from the bill of exceptions that he designated a piece or part of the evidence as objectionable, and moved the Court to exclude it: but on the contrary, resting his case upon the assumption, that the whole evidence of the plaintiff, taken together, was either incompetent, or insufficient, he moved the Court either to exclude the whole or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done on the ground of incompetency, unless the whole is incompetent, which is not pretended. The Court was not bound to do more than respond to the motion in the terms in which it was made."

So in this case, the counsel of Moore offered the

record and proceedings in a suit, as one piece of testimony. Admitting the decree in that suit to have been competent, a great part of the record and proceedings certainly was incompetent. The Court acted on it as it was offered, and rejected it. In doing so, no error was committed: the competent part might afterwards have been offered by the counsel, and if rejected, the remedy would have been afforded here.

The judgment must be affirmed.

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#### HUGHES *versus* ROSS.

- \* In an action for malicious prosecution, the felony charged in the affidavit must be substantially averred in the declaration; but it is not essential to recite the whole affidavit.

In this case, which was an action for malicious prosecution, in Dallas Circuit Court, the declaration recited the particular felony under which the plaintiff had been prosecuted, but did not set out the affidavit at length. On the trial, the Court excluded the affidavit and warrant from the jury, on the ground of their not being conformable to the averment in the declaration. The averment stated, that the said defendant had charged the *plaintiff* with having feloniously stolen, taken and carried away, a roan horse—the affidavit and warrant, charged the offence to have been committed by the *plaintiff* and one *Reddin Hall* in connection. The plaintiff assigned the rejection of the affidavit and warrant, as error.

LIPSCOMB, C. J.—This was an action to recover damages for a malicious prosecution. The plaintiff, in his declaration, averred, that the defendant on the 18th day of June, 1827, at the county of Dallas went and appeared before one David Reeves, Esquire, then and there being one of the justices assigned to keep the peace, in and for the county of Dallas aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in said county, and then and there before the said David Reeves, so being such justice as aforesaid, at Dallas county aforesaid, falsely and maliciously, and without any reasonable or probable cause whatever, on his oath, charged the said Joshua Hughes with having feloniously stolen, taken and carried away, a certain roan horse of him, the said Jesse Ross, sen. and upon such charge on oath, he the said Jesse Ross, sen. falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said David Reeves, as being such justice, to make and grant his warrant under his hand and seal, for taking and apprehending of the said Joshua Hughes, &c. The plaintiff offered in evidence the affidavit of the defendant in the following words—

“STATE OF ALABAMA, }  
Dallas County. }

“Whereas, Jesse Ross, sen. of the State and county aforesaid, hath this day made information and complaint upon oath, before me, David Reeves, a justice of the peace for the said county, that on the night of the 14th instant, one roan horse of him the said Jesse Ross, was feloniously stolen, taken and carried away, from the house of Obediah Hulets, in the county of Perry, and that he hath just cause

“to suspect, and doth suspect, that Joshua Hughes  
 “and Reddin Hall, of the county of Dallas, felon-  
 “ously did steal, take and carry away the said horse.  
 his

“Signed, JESSE x ROSS, sen.  
 mark.

“Sworn to and subscribed before me, this 18th  
 “June, 1827.

“Signed, D. REEVES, J. P.”

The warrant for the arrest of the plaintiff and Reddin Hall was offered in evidence, but the Court rejected and excluded from the jury, both the affidavit and warrant, as inadmissible evidence, under the plaintiff's declaration. The rejection of this testimony is assigned for error.

In this form of action the felony charged in the affidavit must be substantially averred in the declaration. If there is a variance between the felony averred in the declaration, and the charge made in the affidavit, it is fatal to the action: but the plaintiff need not recite the affidavit in so many words. It is sufficient if he avers the substantive part of it necessary to the support of his action, and variances in an immaterial part, will not exclude the testimony.

\*9East.157 In the case of *Purcell vs. Macnamara*,\* the declaration stated that the acquittal of the plaintiff had been on the morrow of the Holy Trinity, and the record produced in evidence showed that the acquittal was on Tuesday after the end of the Easter Term, which was the day of *nisi prius*, before the Lord Chief Justice.

This variance was objected to as fatal, and Lord *Ellenborough*, Chief Justice, sustained the objection, and nonsuited the plaintiff.

On a motion to set aside the non-suit, the Court of King's Bench, composed of the Chief Justice *Grose*, *Lawrence* and *LeBlanc*, Justices, held that the variance was not material; and it was on the principle, that the acquittal was the matter of substance essential to be stated; and it was of no consequence where it took place, so that it was before the commencement of the action. So in the case of *Philips vs. Shaw*.<sup>a</sup> In assumpsit, for not indemnifying the plaintiff, in consequence of his having become bail for one A, in an action at the suit of B, it was stated that B at Michaelmas term 58, George III, recovered against the plaintiff. The judgment given in evidence was at Hillary term. The Court held that this was no variance, inasmuch as it was not matter of description, but an allegation, in substance that the judgment was rendered before the commencement of this suit. The case of *Wheelock vs. Childress*, decided in this Court, but not reported, was expressly on the ground of a variance in the felony charged in the affidavit from that averred in the declaration. In the case of *Bennet vs. Black*,<sup>b</sup> the affidavit disclosed facts amounting to a felony, but not a robbery; the warrant was for a robbery, and the declaration averred that the defendant had charged the plaintiff on his affidavit with robbery.

<sup>a</sup>Barnwell  
& Alders.  
477.

<sup>b</sup>Stewart  
494

The variance was considered by this Court as fatal, on the ground, that it did not charge the same kind of felony in the declaration, as the one charged in the defendant's affidavit. The doctrine seems to be well settled, that the averment in the declaration must substantially charge the particular felony or misdemeanor charged in the affidavit. In the case under consideration, the plaintiff does not assume to

recite the whole affidavit in his declaration, he only states the particular felony, of which it charged him: this was all that was required of him. We are therefore of the opinion, that the variance, if any, was not material, and that the judgment of the Circuit Court must be reversed and the cause remanded.

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KILLOUGH *versus* STEELE.

A bill of sale of personal property, with condition of defeasance or mortgage, founded on a *valuable* consideration, and *bona fide*, is not fraudulent, *per se*, under our statute of frauds, as to creditors not having actual notice of its existence, where the possession remains with the grantor, for more than twelve months from its date.

The terms *good consideration*, in the 3d section of our statute of frauds, where it is said that "this act shall not extend to any estate &c, which shall be upon *good consideration*, and *bona fide*, lawfully conveyed &c," must be construed to mean *valuable consideration*.

In error from Jefferson Circuit Court.

This cause originated in the trial of the right of property. An execution in the name of Jonathan Steele against the goods and chattels of John Killough, was levied on certain property, claimed by Allen Killough, who founded his claim on a bill of sale, with condition of defeasance, or mortgage, made by said John Killough to Allen Killough, dated 16th March 1827; which bill of sale was not recorded. The claimant also relied on possession under the bill of sale and on notice of its existence to the plaintiff in execution. It was proved, that the debt due to the plaintiff in execution was contracted in less than one year after the date of the bill of sale to claimant. The

judge, on the application of the claimant, instructed the jury, that if the bill of sale was made to delay or defraud creditors, it was void; and although made *bona fide* and on valuable consideration, it was still void as to creditors, unless they had actual notice of its existence, or unless the possession of the property conveyed was delivered to the grantee, or he acquired visible possession of the same within one year from the date of the transfer; and that a possession acquired afterwards, although it should have been before the recovery of the judgment on which the execution was issued, was not sufficient to give validity to the sale.

The judgment of the Court made the property subject to the execution of Steele; but directed the costs of the suit to be paid out of the proceeds. Both parties being dissatisfied with this judgment, both joined in the prosecution of a writ of error.

SAFFOLD, J.—The contest arose on an issue to try the right of property in a slave, levied on as the property of John Killough by virtue of executions in favor of Steele the defendant in error, which slave was claimed by Allen Killough, pursuant to the statute, authorising this mode of proceeding, on the sheriff's return.

On trial, the jury found the property subject to the execution; whereupon the Court gave judgment that the sheriff should expose the negro to sale for the satisfaction of the executions against John Killough, besides the costs in that behalf expended.

At the next succeeding term, the record states, "the plaintiff came and moved the Court so to amend the judgment rendered at the last term, as that it may

stand against A. Killough, the claimant in execution, for the costs; which motion was granted."

The facts in evidence, are shewn by a bill of exceptions to have been, that J. Killough the defendant in execution, on the 16th March 1827, executed a mortgage of the slave to A. Killough, which mortgage had not been recorded.

On the 8th of August, 1828, the three executions in favour of Steele, issued by a justice of the peace, were levied on the slave. The debts thus sought to be satisfied, were contracted after the date of the mortgage, and within twelve months thereof.

The claimant relied on his mortgage, and on proof of possession under it, and on Steele's having notice of its existence.

It is further shewn by the exceptions that the Court charged the jury, that although there may have been no actual fraud—the contract entered into on a valuable and sufficient consideration, and fair, and *bona fide*—it was void as to Steele, unless he had actual notice of the existence of the mortgage, within one year from its date; or unless such a possession was given to the grantee within that time, as was calculated to give notice to the neighborhood; that though Steele had actual notice of the existence of the deed, before obtaining his judgment, yet if the notice was after twelve months from its date, and not before, the jury must find for the plaintiff in execution.

The Court charged further, that if such a possession was obtained before the expiration of twelve months as was not of a public nature, though a possession and control in fact, yet the jury were bound to find for the plaintiff, admitting the transaction to



have been *bona fide*, and on a valuable and sufficient consideration.

It is assigned for error.

1st. That the Court erred in the several opinions, to the jury, as stated.

2d. The judgment original and as amended was unauthorized, uncertain and insufficient.

It is contended on the part of the plaintiff in error, who was claimant below that the case is not within the statute of frauds so as to render the deed absolutely void, for want of possession, or of recording; that the statute does not embrace a case where the consideration is valuable and sufficient, and *bona fide*; that the instructions were inoperative, and can not be sustained, except on the ground, that want of possession is fraud *per se*; and that it is not necessary the possession should always be changed so as to be visible to the neighborhood.

On the contrary. it is argued, that both absolute and conditional sales, unaccompanied by possession, are to be governed by the same principles; that the want of possession in either case, is at least a circumstance from which fraud must be inferred, if unexplained; that this explanation on the part of the vendee, must be proof that the sale was not only *bona fide*, and on a valuable consideration, but also that the possession of the vendor was in pursuance of some agreement not inconsistent with honesty in the transaction.

Our statute of frauds, so far as material to this case, is substantially the same with the statutes of 13 and 27 *Eliz.*, the statute of frauds of Virginia, and of several of the other States of the Union; all of which are declaratory of the principles of the Com-

mon Law. A material question raised in this case is, does it fall within the influence of the principles recognised by the statute?

If any part of the statute can apply it can be no other, than the latter clause of the 2d, section, which declares, that where any reservation or limitation shall be pretended to have been made of a use, or property, by way of condition, reversion, or remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another three years, without demand made and pursued by due course of law; the same shall be taken as to the creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent and void within the act: and that the absolute property is with the possession; unless such reservation, or limitation of use, or property, were declared by will, or by deed in writing, proved and recorded as directed in a previous part of the same section. The parts of the section immediately preceeding the clause referred to treat of conveyances of goods and chattels only, or such as include lands also, and which are not on consideration deemed valuable in law; and of pretended loans of goods and chattels to any person with whom, or those claiming under him, possession shall have remained by the space of three years &c. and declares that unless all such conveyances, loans, &c., shall be duly proved and recorded as therein directed, they shall be taken to be fraudulent within the act. Hence it would appear that the reservations or limitations, by way of condition, reversion or remainder, referred to in the same section, were intended to apply to conveyances on consideration not deemed valuable in law. The third section

of the same act, greatly strengthens this conclusion, if the expression, "good consideration," therein is to be understood to mean *valuable*, or *good and valuable* consideration. It directs "that this act shall not extend to any estate, or interest in any lands, goods or chattels; or any rents, commons, or profits out of the same, which shall be upon *good* consideration, and *bona fide*, lawfully conveyed or assured to any person, &c."

In the case of *Hodgeson vs. Butts*,<sup>a</sup> is to be found an exposition of the views of the Supreme Court of the United States, in reference to the Virginia statute, of which ours is a literal transcript. There a mortgage of personal property was the subject of adjudication, and which had not been recorded. Chief Justice *Marshall* in delivering the opinion of the Court, stated the substance of the concluding members of the 2d section to be, "that deeds of personal chattels, not upon valuable consideration, where the possession remains with the donor; or a reservation of interest in the donor, when possession passes to the donee, shall be fraudulent and void, unless proved and recorded according to the directions of the act:" and further remarked "that a mortgage made on a valuable consideration, would be very clearly included from the second section, although the act contained nothing farther on the subject. But to remove the possibility of doubt, the 3d section declares, that the act shall not extend to any conveyance made upon good consideration and *bona fide*. The meaning of the word *good* in the statute of frauds is settled to be the same with *valuable*." He also observed in reference to that deed, "it is perfectly clear that the case is altogether omitted, or is provided for in the

<sup>a</sup> Aik. Dig.  
245.  
<sup>b</sup> 3 Cranch  
155.

act concerning conveyances. In a country where mortgages of a particular kind of personal property are frequent, it can hardly be supposed that no provision would be made for so important, and interesting a subject. The inconvenience resulting from the total want of such a provision would be certainly great; and the Court ought not to suppose the case entirely omitted, if there be any legislative act which may fairly be construed to comprehend it. The act concerning conveyances, although not penned with the clearness which is to be wished, does yet contain terms, which are sufficient to embrace the case; and the best judicial opinions of that State concur in this exposition of it." The statute of Virginia referred to as embracing that case, and requiring mortgages to be recorded is—"the act for regulating conveyances"—the 4th section of which requires, among other enumerated conveyances, that "all deeds of trust and mortgages *whatsoever*" shall be void as to creditors and subsequent purchasers, if not acknowledged or proved, and recorded according to the directions of that act. All the other provisions of the act except in the particular case of marriage settlements, were adapted to the conveyance of lands; and in that case the act provided expressly for recording a settlement of chattels. But it was under the above recited provision of the statute that "all deeds of trust and mortgages *whatsoever*," should be recorded, that the Court decided the mortgage then in question to have been embraced, the object of which was to indemnify an endorser of notes against his liability as such. No similar provision, or any, authorising the same construction, is to be found in any of our statutes concerning conveyances; unless it be the act of

11th January 1828, more effectually to prevent frauds and fraudulent conveyances, and for other purposes"—which, having passed subsequent to the execution of this mortgage, can not affect it.

From a comparison of the statutes of 13 and 27 *Eliz.* with our statute of frauds, in relation to conveyances, it will clearly appear, that the phrase *good consideration*, in the 3d section of the latter, was derived from said English statutes, in which it frequently occurs in reference to *valuable* considerations, perhaps *good* also, in the ordinary acceptation of the word, or any consideration which is legal and sufficient, and *bona fide*. This term is used as a saving clause, in the nature of a proviso, to each of the English statutes, by which the various conveyances, made for the intent, or purpose to defraud, or deceive, are denounced as void. As a proviso to the statute of 27 *Eliz.*—which avoids all conditional conveyances, reservations, or limitations of lands, under circumstances therein described, it is declared "that no *lawful mortgage*, made or to be made *bona fide*, and without fraud or covin, upon *good consideration* shall be impeached or impaired by force of that act" &c. By a previous part of the same statutes the meaning of these words, as therein intended and understood, is fully demonstrated. While treating of conveyances, and describing such as should be void, or valid, the phraseology is used, *purchases for money or other good consideration*, &c.

Our statute of frauds, it will be recollected, contains a clause in the 2d section, additional to any thing expressed in the English statutes referred to. It is that, if any conveyance be of goods and chattels; and be not on consideration deemed valuable in

the law, it shall be taken to be fraudulent within this act ; unless the same be by will, duly proved and recorded ; or by deed in writing ; acknowledged or proved. If the same deed include lands, also in such manner as conveyances of lands are by law directed to be acknowledged or proved, or, if it be of goods and chattels only, then acknowledged or proved by one or more witnesses, in the Superior Court, or County Court, wherein one of the parties lives, within twelve months after the execution thereof ; or unless possession shall really, and *bonâ fide*, remain with the donee. The Virginia statute contains substantially the same. Such is the time and manner of proving and recording conveyances, directed by the act, and to which reference is made in the succeeding part of the same, as already recited. I do not, however, conceive that this member of the section can have any material influence on the decision of this case, either as respects the necessity of recording the mortgage, or the delivery of possession of the slave within twelve months ; nor in determining the effect of the words "good consideration" as recognised in the subsequent section of the act. The member of the section, above quoted, refers expressly to donations or conveyances, on consideration of kindred or affection. It next treats of *loans*, and in the same general clause or sentence, describes the effect of any "reservation or remainder," as previously quoted ; thereby all the objects of the latter members of the section, are placed on the same ground, on considerations "not deemed valuable in the law," in contradistinction to such as are.

Then, as the conveyance purports to be, and in point of fact, is assumed to have been, on a valuable

consideration—as the statute makes no distinction between mortgages and absolute deeds, as this conveyance is entitled to the benefit of any aid deriveable from the provisions of the third section of the statute referred to—a *valuable* being also a *good* consideration; and as the statute has recognised all conveyances as valid, “which shall be upon good consideration, and *bona fide*, lawfully conveyed or assured,” the validity of the mortgage must depend upon the principles of the Common Law, as declared or recognised in the said 2d section of the statute of frauds and perjuries. Independently of the authority referred to, for the construction of the statute, in reference to the words “good consideration,” it would be evidently unreasonable, and inconsistent with legal analogy, to give to conveyances, because founded on relationship or affection, greater validity than such as are for a valuable consideration, when in all other respects equal; and this in opposition to the rights of creditors, or subsequent purchasers.

The instructions of the Circuit Court having been given on the hypothesis, that this deed was on a valuable and sufficient consideration, and the transaction *bona fide*, it now only remains to be considered whether or not the mortgaged property was “lawfully conveyed or assured.” The instructions to the jury were, in substance, that however sufficient the consideration, and *bona fide* the contract, the mortgage was void as to Steele, the creditor, unless he had actual notice of its existence within one year from its date; or unless such possession was given to the mortgagee, within that time, as was calculated to give notice to the neighborhood—that neither notice at a later period, or private or secret possession and con-

trol, at an earlier day, would give validity to the contract. Thus the important doctrine of *fraud per se*, for the want of a change of the possession of the property, or of notice to creditors of the conveyance, is involved, and must determine this case.

The principles maintained by many decisions, both in England and America, by Courts of the highest respectability, would be fatal to this mortgage in terms of the charge given by the Circuit Judge. These cases, or many of them, are referred to and commented on in decisions of this Court, in *Hobbs v. Bibb*,<sup>a</sup> and *Ayres v. Moore*,<sup>b</sup> in the former of which, however, this Court adopted a different doctrine, as a majority conceived, on sounder principle, rather than on weight of authority. In that case it was ruled, that an absolute bill of sale, by a debtor in failing circumstances, and in a contest between the vendee and a creditor, was not *fraudulent per se*, for the reason alone, that possession of the property did not *accompany and follow the deed*. That decision had influence on the case of *Moore vs. Ayres*, and led to one somewhat similar, but with some slight yet salutary qualifications. They both however, go the length to maintain, that the want of possession in the vendee, especially in absolute conveyances, importing such possession is a strong *badge* or *indicium* of fraud, constituting at least *prima facie* evidence of it; and that this evidence should govern the result, unless the legal presumption should be rebutted to the satisfaction of the jury—yet that it was the province of the jury to determine, and if in fact, there was a valuable consideration, and no fraud, the conveyance should be sustained.

My own impressions respecting the authority for,

<sup>a</sup> 2 Stew't.  
54.

<sup>b</sup> Ib. 336.



and the effect of this principle are fully stated in the case of *Moore vs. Ayres*: hence it is now sufficient for me to say *ita lex scripta est*. It is moreover to be observed, that the leading cases on this subject, in both countries—*Edwards vs. Harbin*,—and *Ha-*<sup>2 Term R. 587.</sup>  
*milton vs. Russell*,<sup>1 Cranch, 309.</sup> recognise a material distinction, respecting the necessity of possession in the grantee, between absolute and conditional sales. They maintain, that in the former, importing a change of possession, and use, when the contrary is found to be the fact, the possession does not accompany and follow the deed, and that the suspicious inconsistency, constitutes *fraud in itself*, as against creditors and subsequent purchasers, who may be injured thereby. But that if the failure to change the possession be consistent with the object of the deed, as where the article contracted is incapable of immediate delivery, or where the nature does not require it, or where the deed is conditional and the vendee is not to have the possession until he has performed the condition, in such cases the sale is not fraudulent *per se*, for there the possession “accompanies the deed,” within the meaning of the rule. See also the cases, *Bucknal v. Roeslon*—*Cadogan vs. Kennet*—*Alexander vs. De-*<sup>1 Prec. in Ch. 285.</sup>  
*neale*—*Daves vs. Cope*.<sup>2 Cowp. R. 432.</sup>  
<sup>3 Munf. R. 341.</sup>  
<sup>4 Binney's Rep. 268—2 Kent's C. 403.</sup>

It is true that various other cases of like respectable authority, have ruled different doctrines—some that the deed, whether absolute or conditional, was void unless the possession, where practicable, actually passed to the vendee, as in the case of *Sturdevant v. Ballard*. In others, the rule has been, that the failure of a change of possession, in either case, is but a badge, or presumption of fraud, which like all other presumptions should be left with all other circum

stances of the case, under the instruction of the Court, to the jury who must decide whether there be fraud in fact.

The preponderance of authority in other Courts appears to sustain the distinction more favorable to mortgages, or other conditional sales, where there has been no change of possession ; and the decisions of this Court (to which reference has been made,) have gone far to preclude the idea of constructive fraud for want of possession : hence I necessarily arrive at the conclusion that the mortgage was not void on the ground, that the possession of the slave was not transferred to the mortgagee within twelve months from the date of the deed ; provided the claimant could explain this *prima facie* evidence of it, so as to satisfy the jury of the existence of the valuable consideration, and that the contract was *bona fide*. Yet though there may have been a valuable and sufficient consideration, if the object of the contract was, and the mortgagee united in the design, to defeat, hinder, or delay creditors, the deed was, in fact, fraudulent and void, and such should have been the charge of the Court to the jury.

The branch of the instructions, that the possession must also have been of a public nature, I deem immaterial. The general instructions having been given, that unless *such a possession* was transferred to the mortgagee as was calculated to give notice to the neighborhood, the mortgage was void—its validity on the ground of a clandestine possession was consequently denied. Nor could I hesitate to believe, a private, secret or artificial change of possession, more exceptionable than no change. With respect to the alternative of actual notice of the mortgage to the cre-

ditor, which was held material in the instructions to the jury, it is deemed sufficient to say, I can imagine no kind of conveyance, which the law does not require to be recorded, and in a contract that may be valid without changing the possession of the article, which the law renders constructively void for want of notice in any other form or manner.

It may be, and has often happened, that a subsequent conveyance, on a valuable and sufficient consideration, has been defeated in a conflict with a prior purchaser, who has failed or neglected to record his deed as required by law, on the ground alone of notice otherwise acquired by the subsequent purchaser. The law is thus established on the principle, that the latter purchaser had knowledge of the existence of the prior lien, and that he was contracting litigation, and probably with a view to effect fraud, or at least injustice. To tolerate such would violate the policy and spirit of the law.

Notice through the records, or from actual possession, when necessary, is the only description of notice which the law recognises in the determination of questions of *fraud per se*, so far as actual notice, or any thing tantamount thereto is material. Doubtless, the publicity of contracts, or of claims to property, as well as recording deeds, or changing the possession of property sold, which the law does not especially require to be done, may, in many cases, afford for the jury highly material evidence, on which to determine the faith of the contract, and the question of *fraud in fact*. But under the precedents referred to, by which this Court is governed, Judges at *nisi prius*. can only charge, in relation to these indications of fairness, which the law does not imperiously require,

that the absence of any or all of them, constitutes *badges* or *indicia of fraud*, or is *prima facie* evidence of it; and that it is the duty of the jury to find accordingly, unless other circumstances, or all the facts taken in connection, sufficiently rebut the presumption. The fact of the solvency or insolvency of the mortgagor, which is not shewn of record, was (as is contended by the plaintiff's counsel) entitled to its influence as evidence before the jury.

According to the views I have taken of the case, there was error in the instructions to the jury.

The other assignment need not be considered. In the conclusion to which I have arrived, the Court are unanimous.

Let the judgment be reversed, and the cause be remanded.

COLLIER, J.—The material questions arise out of a bill of exceptions taken on the trial to the instructions of the Judge to the jury. From which it appears, that Allen Killough the claimant of property levied on, to satisfy an execution against John Killough, in favour of the defendant in error, "relied on a bill of sale with condition of defeasance, or mortgage, made by the defendant in execution to the claimant, dated 16th March, 1827; and also relied on possession under said deed, and on notice to the plaintiff in execution of the existence of the deed or mortgage. The bill of sale was not recorded. It was proved that the debt to the plaintiff was contracted in less than one year after the date of the deed to the claimant."

The instructions of the Judge were substantially as follows: that if the conveyance from John to Al-

len Killough was made to delay or defraud creditors, as to such creditors it was void—and further, that though it was founded upon a valuable consideration, and *bona fide*, it was notwithstanding void as to creditors, unless they had actual notice of its existence; or unless the possession of the property conveyed was delivered to the grantee, or the grantee acquired a visible possession within twelve months after the date of the transfer: and that a possession after the expiration of twelve months, though before the defendant recovered his judgment, was not sufficient to give validity to the deed.

The judgment condemning the property to the defendant's execution directs the costs of this suit to be paid from its proceeds, hence both the claimant and defendant in execution, have joined in the prosecution of a writ of error.

The first branch of the instructions, which asserts the mortgage to be void if made to delay, hinder or defraud creditors, is sustained as well by the Common Law, as the statute of frauds; and in accordance with it, the law has been so frequently declared, as not now to allow of disputation.

The second branch is founded in the supposition that actual or constructive notice is essential to a conveyance of personal property as against creditors; and was doubtless the result of so construing the statute of frauds as to bring within the operation of the 2d section of that act, transfers induced by a valuable consideration. Hence it becomes material to adjust the true interpretation of that provision of the act, so far as it has been supposed to bear upon this case. So much as need be noticed is as follows: "and moreover if any conveyance be of goods and chat-

tels, and be not on consideration deemed valuable in the law it shall be taken to be fraudulent within this act; unless the same be by will duly proved and recorded; or by deed in writing acknowledged and proved &c., within twelve months after the execution thereof; or unless possession shall really *bona fide* remain with the donee." These words indicate their own meaning so strikingly, as to leave but little room for the application of the rules of construction. Considerations are of two kinds, good and valuable; these are dissimilar in their nature, and the legal principles adduced from them are alike so. That, conveyances founded on considerations of the latter description are not embraced by this provision, appears in express terms; but it is insisted, that the positive language employed, is countervailed by the 3d section, which is quite as explicit as the 2d; and is expressive of an intention by the legislature to exclude all conveyances, founded on a good consideration, from the influence of the act. The 3d section is in these words: "this act shall not extend to any estate or interest in any lands, goods or chattels; or any rents common or profit out of the same; which shall be upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons bodies politic or corporate." If this section receive a literal construction, the 2d section, so far as we have considered it, would be rendered nugatory; but by supposing "good" to mean "valuable" the whole act is made operative; and this construction is authorised by the trite maxim *ut res magis valeat quam pereat*.

Again: statutes should be construed in reference to the analogies of the law. The obvious discrepancy between the 2d and 3d section is such, as to

forbid a literal interpretation from being placed on each; and as contracts founded on good considerations are less favoured than those founded on valuable considerations, the parts of the act under examination must be holden to apply to contracts of the former, in exclusion of those of the latter description.

In *Hodgeson vs. Butts*,<sup>3 Cranch 140.</sup> a legislative act of Virginia analogous to our statute of frauds was brought to the view of the Court, in relation to which the Chief Justice, delivering the opinion of the Court, observes, "A mortgage made on a valuable consideration would be very clearly excluded from the 2d section although the act contained nothing further on the subject. But to remove the possibility of doubt the 3d section declares that the act shall not extend to any conveyance made 'upon good consideration and *bona fide*.' The meaning of the word good in the statute of frauds is settled to be the same with valuable." Here is an authority in point, upon both the provisions of the act, in which the interpretation we give them is considered as so manifestly just as not to require the aid of argument.

By the last section of the 13 *Eliz. c. 5*, (a statute enacted professedly for the security of creditors against fraudulent conveyances,) it is provided that, that act "shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had made, conveyed, or assured, which estate or interest is or shall be upon good consideration, and *bona fide*, lawfully conveyed, &c." In the decisions upon this act 'good' has been always held to mean 'valuable' and our research does not furnish an authority where it has been se-

riously questioned. All transfers of property made in good faith and upon valuable consideration have been considered exempt from the operation of the act, while those upon good consideration are esteemed invalid as against the then-existing creditors of the grantor—*Cato's adm'r. vs. Easley.*<sup>a</sup>

<sup>a</sup> 2 Stewart,  
214.

Having ascertained that the mortgage does not come within the provisions of the 2d section of the statute of frauds, it is material in the next place to enquire whether the charge of the Court can derive aid from any other enactment or from the Common Law. All of our registry acts previous to the date of the mortgage, apply in terms to conveyances of real estate, except the act of the 29th Dec. 1823—"to prevent fraudulent conveyances" which relates to mortgages when the property conveyed is taken from one county to another, &c.; but does not authorise their registration under other circumstances. Neither the common or statute law requires that the creditors of the mortgagor should have actual notice, as essential to the validity of the mortgage, against them. The charge of the Court in supposing this to be necessary, in the absence of proof of registration, is therefore erroneous.

But notwithstanding this error the judgment may be sustained, if the proposition be just, that possession must pass to the mortgagee in order to give effect to the mortgage as against the creditors of the mortgagor. This proposition would seem to be much freed from difficulty by the decision of this Court in *Hobbs vs. Bibb*,<sup>b</sup> in determining that the circumstance of the possession remaining with the vendor in the case of an absolute sale was only *prima facie* evidence of fraud—subject to explanation. The trans-

<sup>b</sup> 2 Stew't.  
54.



fer in question is not absolute, but conditional; let us therefore enquire what are the decisions upon the point of possession, applicable to such a state of fact.

In *Hudson vs. Warner et. al.*<sup>a</sup> it was held, that the retention of personal property by a vendor will not prejudice its transfer, where his deed showed that the sale was not to have its completion immediately, but was prospective to a future event: till that future time his possession is entirely consistent with his deed.<sup>2 Har. & Gill. 415</sup>

So in *Conard vs. The Atlantic Insurance Company*,<sup>b</sup> it was decided, where the sale is not absolute but conditional, the want of possession, if consistent with the stipulations of the parties, and *a fortiori* if flowing directly from them, has never been held to be *per se* a badge of fraud. To the same point, see *Baylor vs. Smithers*,<sup>c</sup> *Croft vs. Arthur*,<sup>d</sup> *Trotter vs. Howard*.<sup>e</sup>

The record does not discover whether the mortgage became forfeited prior to the levy of the defendant's execution: before that time the retention of possession was compatible with the transfer, and not in itself a badge of fraud. But if a mortgagor retain the possession after the forfeiture of the mortgage, for a time, within which the mortgagee might have acquired it, such continued possession, is *prima facie* evidence of fraud, and the principles of decision in *Hobbs vs. Bibb*, would be applicable. In any point of view the charge is erroneous in supposing the retention of possession without actual notice of the mortgage to the defendant, to avoid it *per se*.<sup>f</sup>

This view of the case being decisive of its merits—the other errors assigned need not be considered

I concur with the Court in the conclusion that the judgment should be reversed and the cause remanded.

TAYLOR, J. not sitting.

GOADING *versus* BRITAIN.

An effort on the part of the indorsee of a note, to find the maker in order to make a demand of payment, need not be by a personal application at his last place of residence, if it is notorious that such last place of residence has been abandoned.

Under our statute, notes made payable in "notes," are negotiable as though made payable in money.

This was an action of assumpsit in Lauderdale County Court, brought by the indorsee of a promissory note against the indorser. It was in proof that the plaintiff searched for the maker of the note, in order to make a demand of payment, but that coming in sight of his house, he found it closed; and was told, that he had left the country. Plaintiff made no personal application at the house, and desisted from further search. Two points were assigned for error in this Court. First, that the application or demand of payment should have been made at the house of the maker. Second, that the note being payable in cash notes, was not a negotiable instrument.

*Peter Martin*, for Plaintiff—contended,

1. That if appellant was satisfied of the absence of the maker, it was not necessary to go to his late residence—*Chitty on Bills* 261. Rumor is sufficient. [Stopped by the Court.]

*Wilson and Shortridge, contra*, insisted,

1. That the demand should have been such as was diligent; and proper diligence was not here exercised. The search was not certain—it was founded on vague rumor—not such as the law sanctions.

2. That the note was not negotiable, being payable in property.

LIPSCOMB, C. J.—This action was brought by an indorsee against the indorser of a promissory note, made and executed under seal by one Manly, to the defendant, for the payment of fifty eight dollars and fifty cents, in cash notes, and indorsed by the defendant to the plaintiff. After the transfer of the note, it was placed by the plaintiff in the hands of the defendant as collateral security, in consideration of the defendant's becoming appearance bail for plaintiff in a suit that had been commenced against him. The note remained with the defendant until after its maturity, when he returned it to the plaintiff with instructions to get payment from the maker, and that he, the defendant, would not stand bound for the payment, and telling him that the maker had then returned from the legislature where he had been a member, from the county of Lauderdale. The usual place of residence of Manly, the maker, had been for several years, in the town of Florence, and that was his last known place of residence. The plaintiff went, immediately on receiving the note, in search of Manly: and when at the house opposite to the one in which Manly had resided, the street only between them, and in full view, plaintiff discovered that Manly's house was closed up and no appearance of any one being in it, and was told that he had left the country. The

plaintiff in a few days gave notice to the defendant of his unsuccessful efforts to find Manly. It further appeared that Manly never did return to his residence in Florence, but left the State. There was no evidence that the plaintiff knew where he was at the time of his search for him, at his last residence.

The counsel for the plaintiff, in substance, requested the Court to charge the jury, that if the plaintiff went near enough to the house of Manly, and made such observation and inquiries as to satisfy a reasonable man that the house was not inhabited, and that Manly had left, that it would dispense with a demand at the house of his last residence. But the judge charged the jury, that if the plaintiff in his search after Manly stopped short of going actually to the house, that is, if he stopped at the house across the street, opposite to his residence, that it would not be sufficient evidence to entitle him to recover. The refusal of the Court below to give the charge prayed, and the charge given are now assigned for error. I cannot conceive what more conclusive evidence, could be required of the fact of the house being abandoned by its tenant, than its appearance as represented in the evidence, coupled with the information of the nearest neighbors, on the same street, that he had left the country. But if further evidence could be required, it was in proof that at the time of the search made he had actually left the house, and never did return to it. If the plaintiff had known where he was, it would have been his duty to have gone to him and made the demand, if practicable, but there is no evidence that he was in possession of such information. It would have been an idle farce to have called to the closed up house for payment. I can

not perceive the supposed analogy in the demand to be made in this case, and a demand to be made at a Bankers, after such banker had stopped payment. Although the Banker may have failed, may have stopped payment of his bills, and become wholly unable to make payment, yet it would not necessarily follow that the banking house was wholly abandoned, and no one to answer to the demand. If this were proved, it seems to me that a demand at the banking house would not be required. If the plaintiff not knowing where the maker is, makes an effort to find him at his last place of residence and is informed that he has left the country, it is sufficient diligence on his part.

An objection was taken by the defendant's counsel that does not appear to have been raised in the Court below. It is urged that the instrument endorsed, and on which the present action is brought, is not negotiable, in as much as it is not for the payment of money. This objection would be well taken if the action had been brought either under the custom of merchants, or under the statute of *Anne*. But our statute (*Digest*, page 69,) authorises all obligations, bonds, bills single, promissory notes, and all other writings, for the payment of money, or any other thing to be assigned by indorsement, and authorises suit to be maintained against the endorser, as in cases of inland bills of exchange. The plain and obvious construction of this statute, and the uniform practice under it, for nearly twenty years, seems to me to furnish a satisfactory answer to the last objection to the plaintiff's right of action,

We are therefore of opinion, that the judgment of

HERBERT & KYLE *vs.* THE NASHVILLE BANK.

the Court below must be reversed, and this cause remanded.

SAFFOLD, J. absent.

HERBERT & KYLE *versus* THE NASHVILLE BANK.

Where a party after being overruled on a demurrer, pleads over, he can not, if the declaration sets forth a cause of action) afterwards allege error in the judgment on such demurrer.<sup>a</sup>

In an action on a note, payable to a party *eo nomine*, the capacity of the latter to contract and sue is *prima facie* admitted under the plea of the general issue. Whether the statute book of a sister state, published under the proper authority, can be read in evidence in the Courts of this State—*Quare*.<sup>b</sup>

But if the only testimony of an authority for the publication of such statute book, is the declarations of witnesses, *ore tenus*, the book is inadmissible.

This was an action of debt, brought in Madison County Court, against the plaintiffs in error, to recover the amount of a promissory note. The note was payable to the "Nashville Bank," and the declaration thereon was in the usual form, but contained no special averment, that the Bank was a body corporate. After a demurrer, which was overruled, the defendants, below, relied on the pleas of *nil debet* and *nil tiel corporation*.

On the issues, a verdict was had for the plaintiff. It was assigned for error in this Court—

<sup>a</sup> By a statute passed January 10th, 1835, it is enacted, that when a demurrer is overruled, and the party pleads over, he shall not be considered as waiving any matter embraced by the demurrer.—See Aikin's Dig. 2d ed. page 818.

<sup>b</sup> See the case of Cox and Cox *vs.* Robinson, of this term.

1. That the declaration was insufficient, containing no special averment that the Bank was a corporate body.

2d. That the Court permitted the plaintiff's counsel to read to the jury, from "Scott's edition of Tennessee laws."

*Craighead* for the Plaintiffs in error, said—that it was necessary for it to have been stated in the declaration, that the Nashville Bank was a corporation. The words "Nashville Bank," do not convey absolutely the idea of a corporation. It does not appear that there was a lawful payee. If the note had been given to an individual it would be a different thing, but this does not appear. It does not appear to be to an individual, or a proper promisee. If we reverse this case, from whom could we get costs? There is no individual, or corporate body, It being out of the State of Tennessee it should have been described as a corporation; if it had been in this State, it would have been different, but we do not know corporations of other States. Plaintiff had no authority to prove what was not alleged. The declaration did not admit of such proof. The plea was *nil debet*: this required all the proof requisite to support the cause of action.

But if we admitted we bound ourselves to pay to a corporation, yet we offered to plead *nul tiel* corporation. We can show that it forfeited its right to sue, as such, and this we were authorised to do.—18 *Johns*. 137. The plea of *nul tiel* corporation is a plea in bar—1 *Sanders*, 34. We contend, that after a plea has been overruled by the Court, they have discretion to impose costs; but the right to the plea is absolute.

(See acts of 1824, page 17.) The discretion extends only to the costs, and the County Court erred in refusing our plea unconditionally. Again, if the action had been well brought, and the plea well proved, the Court erred in receiving the Revised Code as evidence. The statute book is not evidence, and the act of 1828, provides the mode of certifying evidence of this nature.

The mode is different in relation to a Bank charter. The charter itself must be produced—2 *Cranch*, 168—4 *Dallas*, 415—2 *Kent's Com.* 247. We had a right to plead *nul tiel record*, and it was improperly refused. The charter itself must be produced.—*Cox's Dig.* 167.

*Brandon, contra.*—The first position seems to be one which should have arisen on the demurrer. The plea offered at that stage was a matter of discretion, and was properly rejected, which the case of *Gaines vs. Tombeckbee Bank*, in *Minor's Reports* will show. The defendant was estopped from denying the existence of such a corporation by making his instrument and by pleading.—4 *Cranch*, 384. It is admitted that *Scott's Digest* was printed by authority of the Legislature and this is sufficient. For this reason it was not necessary to prove before a jury that this was a corporation.—14 *Johns. Rep.* 244—1 *Peters*, 386, 395, 466—4 *ib.* 480, 501. Where a corporation sues, it is necessary to state in the declaration that the payee is a corporation, and the proof comes on the trial. This has been settled by several cases in New York. The loss of charter must be shown by an adjudication to that effect. Our statute on promissory notes has altered the Common Law. It makes a



note evidence of the debt, unless the consideration be impeached. But it is not so at Common Law—the proof of a cause of action was required to be given, but here the note is made evidence of all it purports, unless its consideration be impeached by the defendant.

The plea coming in too late, and being rejected, the parties were properly in Court, and there can be no distinction between this case, and the one in *14 Johnson*. Making the contract, admits a contractee, and the term “Bank” is a word well understood. It is commonly a corporation, and the Court will not understand it to be a contract with a house.

At Common Law, the execution of a note was necessary to be proved under *nil debet*, but it is not so here. It is the same here, unless payee be denied on oath. It is evidence unless *nul tiel* corporation be pleaded in a proper time.—*Aik. Dig.* 67, 189, 440, 462, sec. 3 and 4.

COLLIER, J.—The defendant in error prosecuted an action of debt in the County Court of Madison, on a promissory note for the payment by the plaintiffs, of the sum of one hundred and eighteen dollars and sixty one cents, “to the Nashville Bank,” payable at the Branch at Winchester. There is no allegation in the declaration, that the “Bank” is a body politic. The plaintiffs demurred to the declaration, and the demurrer was overruled: whereupon they pleaded by leave of the Court, *nil debet*, and proposed to plead *nul tiel corporation*, which plea, the plaintiffs refusing to verify by affidavit, was rejected by the Court. On the trial, the defendant’s counsel read to the jury, from Scott’s edition of the Tennessee

laws, an act incorporating the "Nashville Bank:" having first proved by the testimony of witnesses, that the book from which he read was published by authority of the Legislature of that State; to all which the plaintiffs objected.

The questions raised upon the demurrer, to the declaration, can not now be revised. This Court has repeatedly decided, that a defendant who has pleaded over, upon his demurrer being overruled, can not allege error in the judgment on demurrer, if the declaration sets forth a cause of action. The adequacy of the cause of action disclosed in the declaration, is not questioned; but it is insisted that the corporate character of the defendant should have been shewn by a suitable averment. The justness of this argument need not be examined, it is enough to remark, that on the general issue, the note being payable to the defendant *eo nomine*, its capability to contract and sue, is *prima facie* admitted.

Under the second section of the act of '24, "to regulate proceedings at Common Law," the Court had the right to require of the plaintiffs some evidence that the plea which was disallowed, went to the merits of the action. It was not necessarily interposed to prevent an unjust recovery, but may have been pleaded for the purpose of gaining an advantage over the defendant, because it was not prefaced with proof of a corporate character.

The view which we have taken of this case, shews the act read from the statute of Tennessee to prove a corporate character, to have been *proof superfluous*. Whether the statute book of a sister State, published under the proper authority, can be read in evidence in our Courts, is a question on which we are much

divided, and therefore decline considering it. We all, however, concur in the opinion, that if the only evidence of an authority for publication, is the declaration of witnesses, *ore tenus*, the book is inadmissible: but the corporate character of the defendant not being in issue, the judgment must be affirmed.

CRENSHAW, J.—In this case the declaration does not aver that the Nashville Bank is a body corporate, nor does the fact appear from any part of the record.

I lay it down as an incontrovertible proposition, that an action cannot be sustained without a person, plaintiff, either natural, or artificial. No one will seriously contend, that the expression "Nashville Bank," means a natural person; if then it imply such a person as could maintain an action, it must be an artificial one, and be incorporated.

The word Bank does not *ex vi termini* imply a corporation; for it may mean other things as well as a monied institution: thus, in common parlance, we say, a bank of sand, a bank of corn, as well as a bank of money: besides there have been, and are yet, Banks and other associations of individuals; for various purposes, which were never incorporated.

I have no doubt but that the Nashville Bank has been incorporated by an act of the legislature, yet as the record does not inform us of the fact, we cannot officially know it.

We are bound *ex officio* to take notice of the acts of our own State, whether they be public or private; but the acts of another State, we cannot know unless brought to our knowledge through the medium of the record.

We are bound to know that our own banks are corporations, because our laws have made them so: hence they may sue by their corporate names, without averring that they are corporations: but we cannot know that the banks in Tennessee are corporations, unless it had been so averred in the declaration.

It not appearing then from the record, that there is any plaintiff, either natural or artificial, who can sustain the action, the objection is fatal on a writ of error, whatever in other respects may have been the state of the pleadings. For there is a manifest distinction between an improper or disabled party and no party at all. An objection on the first ground may be waived by pleading to the merits of the action; but where there is no party, as in the case before us, the objection is fatal, even after verdict and judgment.

I am aware that this Court at an early period of its existence decided, that if a party plead over to the merits of the action after his demurrer has been overruled, he thereby abandoned his cause of demurrer, and could not afterwards assign it as error in this Court. Not believing this ever to have been the law, I for one am now prepared to overrule that principle of decision, and to settle the law on its true ground. It cannot comport with reason and justice, nor is it good law, that by pleading over the party shall be placed in a worse condition than if he had not demurred, the Court having erroneously overruled his demurrer.

I am also of opinion that it was erroneous to receive evidence of the statute of Tennessee by which the Nashville Bank was incorporated.

1st. Because there being no averment in the declaration, that the Nashville Bank was a body corporate, under the state of the pleadings, no evidence of the statute was receivable. For evidence could not cure or supply the omission of a material averment in the declaration, and which averment was necessary to make out a legal plaintiff to the action.

2d. Because if evidence of the statute was receivable, yet the evidence offered was illegal and inadmissible: for I hold that there are but two modes by which the statute of another State can be proved or become authentic testimony in our Courts, viz.

1st. Under the seal of the State from which the statute comes, pursuant to the provision of the act of Congress, and

2d. A certified copy by our Secretary of State, according to the provision of our act of Assembly.

These two modes of authenticating the statutes of other States being prescribed by Congress and by our legislature, are sufficient of themselves for every purpose of evidence, and do virtually supersede the more doubtful and uncertain mode which it is alleged to have been the practice under the Common Law.

I am for a total reversal.

PERRY, J. not sitting.

## BELL versus ELLIS' HEIRS.

An action of assumpsit for rent, will not lie at Common Law, except on an *express promise* made at the time of the demise.

The act of 1812, in relation to the action of assumpsit for rent, applies only to the case of a demise, and where there exists an *agreement* creating the relation of landlord and tenant.

So, where A has the possession of land under an agreement of sale from B, who had no legal title to dispose of it; this action can not be maintained by the owners of the land to recover of A, rent for its use and occupation.

In error from Morgan Circuit Court.

This was an action of assumpsit, instituted by Gragg, as next friend of Ellis' heirs, to recover rent for the use and occupation of a tract of land, of which Ellis died deceased. So much of the bill of exceptions as determined this cause, showed, that the widow of Ellis married one White, who, independent of the requisitions of a special statute, authorising the sale of the land referred to, entered into an agreement of sale with Bell, under which the latter held the land in possession. The land being subsequently sold by the administrator of Ellis' estate, in conformity with the statute, the present action was brought for use and occupation, against Bell. The jury found a verdict in favor of the plaintiffs below, and the case was brought to this Court for revision.

CRAIGHEAD, for Plaintiff—HOPKINS, *contra*.

WHITE, J.—The heirs of John Ellis brought this action of assumpsit in the Court below, against the plaintiff in error, to recover rent for the use and occupation of a certain quarter section of land, in 1825, of which their said ancestor, died, possessed.

## BELL vs. ELLIS' HEIRS.

The bill of exceptions shews, that Samuel Gragg, and the widow of said Ellis, having administered on his estate, had, for some years previous to 1824, rented said land, and applied the proceeds to the support of the widow and family—she never having had her dower assigned. Prior to 1824, one John S. White married said widow, and as administrator in right of his wife, together with Gragg the other administrator, rented said land for that year to Bell, the plaintiff in error. By an act of the Legislature, the personal representatives of Ellis were authorised, upon certain conditions therein specified, to sell this land. It was proved that Bell was in possession for the year 1825, and that some time early in that year he contracted with said White for the purchase thereof, but not in the manner sanctioned by the act of Assembly. After the year 1825, the land was sold according to the provisions of the act, to one Turner, for about four thousand dollars. The plaintiffs in the Circuit Court offered said John S. White as a witness. The defendant objected to his competency on the ground of interest; but the Court overruled the objection, and White being examined, testified essentially different from the other witness as to the sale to Bell. In this state of facts the Court charged the jury, that they should consider the sale made by White as void, he having no interest or power to sell in any other manner than that prescribed by the statute, and that such sale formed no bar to the recovery of rent from the defendant as tenant. Bell then moved the Court to charge, as in case of non-suit, for the non-joinder of White, as plaintiff in the action, who, it was insisted, was entitled to his wife's dower. But the Court refused, and charged, that White had no interest in the

suit, as the dower of his wife had not been set apart.

By the assignment of errors, the correctness of these several opinions are brought to our view, together with the further question, whether, under the state of facts presented by the record, the action of assumpsit, for use and occupation on an implied promise will lie. - As the last is a question which may be decisive of the case, I shall notice it first. The action of assumpsit for rent will not lie at Common Law except upon an *express promise*, made at the time of the demise. The action, such as the one we are now considering, is given by our act of December, 1812,\* which is transcribed from the English statute, 11th Geo. II, c. 19, s. 14; and this applies, as it would seem, from its very terms, only to the case of a demise, and where there exists the relation of landlord and tenant, founded on some agreement creating that relation. In New-York, this statute of Geo. II, is as here, incorporated with their Code, and in the case of *Smith vs. Stewart*,<sup>b</sup> the above principles are recognised. From them, the Court there concluded, "that the defendant having entered upon the lands under a contract for deed, such contract so destroyed the relation of landlord and tenant, between him and the vendor, that the latter could not recover in assumpsit for rent, though the purchaser had himself refused to complete the purchase. The same doctrine is held in *Kirtland vs. Poinsett*.<sup>c</sup> The Court there decide, that if a purchaser take possession of premises under a contract of sale, which on account of a defect in the vendor's title fails to be completed, the vendor can not afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation."

\* Aik. Dig.  
701.

<sup>b</sup> 6 Johns.  
Rep. 46.

<sup>c</sup> 2 Taunt.  
R. 145.



The cases cited from 13 *Johns.* 240 and 297 do not seem to conflict with those already referred to. They only determine that assumpsit for use and occupation, will lie upon an implied promise when a tenant holds over after the expiration of a lease by deed. In the first case the Court say "that the holding over is characterised by the previous lease, and must be deemed a holding by implied permission of the original lessor; and in the other, they expressly distinguish it from the one of *Smith vs. Stewart.*"<sup>a</sup> Then <sup>6 *Johns.* 46.</sup> the correct doctrine of the books is this—that this action upon an implied promise for rent, will only lie in virtue of the statute, and when the relation of landlord and tenant is preserved, and that this relation will be destroyed when the possession is held under a contract of sale, though that contract may be void, ineffectual to convey the premises, or even prevented by the purchaser himself. These principles are evidently fatal to the present action. For Bell held possession in 1825, under a contract with John S. White, for the sale of the land, which though manifestly void, had the effect to destroy the relation of landlord and tenant which we have seen, is essential to the maintainance of the action. As this disposes of the whole case, it is useless to consider the other assignments of error.

The judgment of the Circuit Court must be reversed.

WALKER *versus* TAYLOR.

Where a garnishee is summoned pursuant to law, to appear and answer as to his indebtedness to another, and it appears from the authority indorsed on the process that the summons was served by a deputy specially authorized by the sheriff to make that service; the counsel for the debtor—not being counsel for the garnishee—cannot have the summons dismissed, on the ground that the authority to the deputy to serve it was in fact given not by the sheriff, but by a deputy; this not appearing on the face of the papers—and the garnishee not having appeared or pleaded.

In error from Madison Circuit Court.

Walker recovered of Drumgoole a judgment for three hundred and twenty four dollars and thirty four cents in the Madison County Court. At a subsequent term, Taylor, who was alleged to owe Drumgoole three hundred dollars, was summoned as garnishee. The summons had a deputation indorsed on it in the name of the sheriff, appointing one Bullington to execute and return it. It was so executed and returned. At the subsequent term Taylor, though present, refused to state as to his indebtedness to Drumgoole. Application was made for judgment *ni si* against him; but the counsel for Drumgoole resisted the application, and without stating whether they represented Drumgoole or Taylor, moved to dismiss the summons, on the ground, that the authority given to Bullington to execute it was in fact given not by the sheriff, but by a deputy. The record also set out this fact as appearing to the Court, and the summons was on that ground dismissed. An appeal was taken to the Circuit Court, where the judgment of the County Court was affirmed; from which judgment the case was brought into this Court by appeal.

*Craighead*, for plaintiff.—The first ground of error is the motion to quash, because not served by the sheriff, and second, no return of *nulla bona*. In this case the sheriff appeared and declared, that he sanctioned the act of his deputy, but the Court suffered the debtor to oppose the garnishment. I contend,

1st. That the summons directed to the sheriff was regular.

2d. That the service by an individual was legal.

3d. That the appearance waived all error.

4th. That the debtor could not object.

As to the first point, see *Alabama Rep.* 14. In this case the deputy sheriff had returned the precept signed D. S. and the Court said that the return was illegal, because his authority did not appear. But if the Court has evidence of the authority of the deputy, it is sufficient. The reason of this decision was, that the Court could not tell who he was. The case we have under consideration shows his authority in writing, which makes a material difference. It is said that the return, or service should be in the name of the high sheriff; this is mere matter of form. The sheriff himself shows by his endorsement the character of the individual who served the process.

The deputy sheriff acted in the most legal and correct way he could act—see 1 *Lord Raymond*, 660, 661, 662. Here he returns it in the name of the high sheriff. This case shows that when there is but one authority to do an act, that it will be considered as one, under that authority—5 *Johns.* 137.

Our act does not require that service should be made by the sheriff alone. This is different from a writ. There, final judgment in the first instance goes on failure to appear; but here a judgment *ni. si.*

only goes, and the plaintiff takes his judgment *ni. si.* at his peril. No injury can arise on no service—the plaintiff would pay the costs; hence the distinction made by the statute, which requires service in the one case and not in the other—*Dig.* 314.

As to the summons it may be directed to any one; the statute does not restrict it to the sheriff. *Toul. Dig.* 316, *Acts of 1823 page 20, 9 Mass. Rep.* 532.

*Brandon, contra.*—The errors assigned in the Circuit Court are the only ones under consideration. It has been decided in New York, that a deputy may make a special deputy, but I am disposed to question the correctness of the decision. It has never been so decided here, and the rule is not a good one, as it is liable to great abuses. There must be a peculiarity in the laws of New York. The law here refers to the acts of no one but the sheriff and those of his deputy. It will not do as a general rule to say that a sheriff may come in and recognise the act of a special deputy.

The case in *Minor's Reports*, page 14, is decisive for us as to one point. The process is directed to the sheriff and must it not be served by the person to whom it is directed? It is the writ and leading process and ground of the action, and he must appear and plead. The statute implies that it must be served by the sheriff, for it refers to another statute, the statute of attachments, which expressly requires the sheriff to attach in the presence of witnesses—*Digest page 12, sec. 4.* This law is referred to, and made the law in this case, and requires the summons to be in writing—2 *Caines*, 61.

The debtor has a right to appear, for he is inter-

ested, and the case in 9 *Mass.*, does not apply. There is no law in this country which refuses to the debtor the right to appear and defend. Then he has a right to litigate. Will not the rules of the Common Law allow a party always to defend a right? The garnishee has no interest, whether he pays to one or another, but now he comes to show that the plaintiff has no right to take his money.

SAFFOLD, J.—The plaintiff in error having recovered of Morgan and Drumgoole a judgment for three hundred and twenty four dollars and thirty four cents in the County Court of Madison, at February term 1827; in January 1828, he, the said Walker, made affidavit before the Clerk of said Court, that neither of the defendants to said judgment had property, or effects subject to execution, and wherewith to satisfy the judgment so far as he had knowledge or information, except what Taylor, the defendant in error might owe Drumgoole; and that he had been informed, and believed, Taylor was so indebted in the sum of three hundred dollars, wherefore he prayed a summons pursuant to the statute, to compel Taylor to appear and answer as garnishee at the next term thereafter. The summons having issued in the usual form, a deputation appeared upon it in the name of J. P. Neal sheriff, constituting and appointing W. H. Bullington his lawful deputy, to execute and return the same. On the summons, the following return appeared, "I do certify that I have executed the within writ, 23d January 1828, W. H. Bullington." At the succeeding term of said Court, February 1828, Taylor the garnishee being present in Court, was called on by the plaintiff's counsel to make a declara-

tion of his indebtedness according to law, which he declined doing, whereupon said counsel moved for judgment *ni. si.* against him. On which occasion, as the record states, the attorneys of Drumgoole without stating whether they represented Drumgoole or Taylor, offered resistance against the motion for judgment *ni. si.* by objecting to the declaration being made by the garnishee, and asked and obtained leave to move to dismiss the summons. And as the record also states, "it appearing to the Court that the deputation of Wm. H. Bullington made on the summons in the name of J. P. Neal, sheriff of the county, was in fact made by John M. Bowyer his deputy, who had a general power from said sheriff to make, in his name, such deputations, though no special power in the present instance, but that said sheriff did on the first day of the term recognise and approve the said deputation as his act;" and the Court being of opinion that the summons had not been legally served on the garnishee, the same was dismissed at the plaintiff's cost.

This judgment having been removed to the Circuit Court for revision by writ of error, the same was there affirmed—from which judgment of affirmance the plaintiff Walker prayed and obtained an appeal to this Court, and here insists, that the Circuit Court erred in not sustaining the assignments made on the record and proceedings had in the County Court, viz.

1. In refusing to examine the garnishee, Taylor, when he appeared in Court, in obedience to the summons.
2. In suffering the debtor, Drumgoole, to resist the judgment.
3. In refusing judgment *ni. si.* against the defendant.

The principal ground of objection is to the plaintiff's proceedings in the County Court, that on which the summons of garnishment was dismissed in the County Court, and on which the judgment was affirmed in the Circuit Court, was the supposed insufficiency of the service of the summons. The opinion of the County Court having sustained the objection, the consequence was a refusal by the Court to examine the garnishee, or to render judgment *ni. si.* against him. This opinion of the Court was elicited by the motion of the counsel of Drumgoole, one of the original defendants, without professing to be the counsel of the garnishee. Hence it appears, that all the assignments of error depend on the validity of the exception to the service as stated. The argument of the counsel in this Court, was directed mainly to an investigation of the question, whether a deputy sheriff has power to constitute a deputy, or make any sub-appointment for the execution of a particular process. On this question and on the authorities submitted, the Court is so far divided as to find some difficulty in arriving at a satisfactory conclusion; but we conceive the question not necessarily involved in the case. A deputation having been written on the summons, which purported authority in the name of J. P. Neal sheriff, to Bullington as his lawful deputy, to execute the particular process; in examining the sufficiency of the service, the attention is necessarily directed to the appointment, as well as the return—the latter may properly be viewed with reference to the former; and though Bullington has not signed his return expressly, as either general or special deputy, or annexed to his signature the name of Neal the sheriff, which on ordinary occasions is

indispensably necessary, the omission to do so under the circumstances of this case leaves no doubt, or uncertainty as to the capacity in which he acted. The return and appointment, viewed in connection as they should be, shew expressly in what character the deputy acted—that he executed the process as the deputy of Neal, the sheriff.

But this is not specifically the point mainly relied on: it is that Bullington had not been appointed by the sheriff personally, but in fact by Bowyer, who was himself a deputy, under a general power to make deputations in his name. It is true, the record states that this latter fact appeared to the County Court; but in what way is not shewn—Taylor, the garnishee, had made no appearance, and of course had filed no plea either in abatement or otherwise. If the Court would sustain the motion of counsel, virtually, as *amicus curiæ*, it must be for some defect apparent on the face of the proceedings, which was not the situation of this case; nor was the Court authorised to take any notice of the *extrinsic* fact, unless advantage had been claimed of it, by plea, for and in behalf of the garnishee.

The affidavit of the plaintiff as granted by the clerk in vacation, and the summons of garnishment, returnable to the succeeding term, are believed to be fully authorised and sustained by the statute of 1823, '24, cited in the brief.

We are therefore of opinion, that the judgment of the Circuit Court must be reversed, and the cause remanded, to the County Court, for further proceedings.

WHITE, J. not sitting.



HEIRS OF CALLER *versus* MALONE et. al.

*Scire Facias* to the representatives of an estate, to make them parties to a suit, must be directed to them, as such.

The Supreme Court will not entertain an *ex parte* motion to make individuals parties to a suit, on the return of a general *scire facias* only served on them, without evidence of their representative character.

This was a motion, submitted on the part of the plaintiffs, praying that William Crawford might be made a party to the above suit, as representative of the estate of Shields. A *sci. fa.* had before issued generally and had been returned, executed on Crawford.

LIPSCOMB, C. J.—At the last Term of this Court, the death of Samuel B. Shields was suggested and an award of *scire facias* prayed, to make his representatives parties. The *scire facias* issued, was in general terms, to the representatives of Shields, without designating them by name, or characterising them as administrators or executors; this *scire facias* was served on William Crawford.

The plaintiffs now move to make William Crawford and Benjamin Glover parties as administrators. The only evidence of their being administrators is the record of another suit in this Court, where they have been made parties as administrators.

There has been no appearance, and the application is wholly *ex parte*. The motion must be overruled, and the plaintiffs, when they have satisfied themselves that the persons now sought to be made parties, are the administrators, they can have a *sci. fa.* directed to them as such.

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HUNTSVILLE BANK *vs.* M'GEHEE'S *ex'ix.*

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HUNTSVILLE BANK *versus* McGEHEES, *Ex'ix.*

The Act of 1823 declaring a forfeiture of the charter of the Huntsville Bank to ensue from a failure to pay specie for its notes, did not take from the Bank the right to sue in its corporate capacity.

The plaintiff in error brought an action of debt in Limestone Circuit Court, against the defendant, to recover the amount of a promissory note. The defendant plead in abatement, that the charter of the plaintiff had expired, and that the "Huntsville Bank," in its corporate capacity, could not maintain an action. On this issue there was a verdict in favor of the defendant. This point, as also others, noticed in the opinion of the Court, were here assigned for error:

*Hopkins*, for the plaintiff's in error.—The original charter of the Bank gave the right to the stockholders to use the corporate name for two years after the expiration of the term of the incorporation, for the purposes of bringing and maintaining suits, settling the accounts and selling the property of every kind of the corporation. The enjoyment of this privilege, after every other should cease and the term of the charter itself expire, was secured. The powers of the corporation whilst the charter endured, were as ample without as with this privilege. This could be of no use and could not be exercised until the corporation ceased to exist. The act of 1823 could cause a forfeiture of the charter only before the expiration of the term of incorporation; but does not affect any privilege which the charter gave after the corporate powers and the charter itself might end. The

stockholders have, in the event of their being deprived of the charter by a judgment of forfeiture, obtained according to the course of the common law, the same right to bring and maintain suits in the corporate name, as they would have after the charter had expired by its own limitation. A forfeiture has not a more destructive effect upon the powers of a corporation than the expiration of the charter would have; and the last event could not disable the stockholders from suing in the corporate name for two years after it might occur. The right to sue does not depend on the continued existence of the corporation. It was given for the whole term allotted to the corporation, and two years beyond the longest period the charter could endure. The defendant relies on the act of 1823, and the proclamation of the Governor which it directed, to shew the charter has been forfeited, and that the plaintiff is without capacity to maintain this action. This statute amended the original charter, and did so with the consent of the stockholders. The amendments consisted in making the refusal or failure of the Bank to pay, on demand, specie for its notes, a cause of forfeiture of the charter, and giving power to the Governor to issue his proclamation declaring the forfeiture for such cause. But the forfeiture could not take effect immediately after the proclamation might be issued. The statute secures to the stockholders all their corporate powers for three years after the date of such proclamation. The effect of a forfeiture under the statute, will take place when the corporate powers may terminate. If the object of the three years allowed by the statute, were expressed to enable the stockholders to bring suits in the corporate name,

instead of being to enjoy all their corporate powers, it would not be denied that the legislature intended the three years after a forfeiture by proclamation, as a substitute for the two years allotted by the charter after the expiration of the term of incorporation.— But as the object of the three is different from that of the two years, the benefit of both may be consistently enjoyed. If the forfeiture of the charter for any cause, which, independently of the statute of 1823, would be an adequate one, could not deprive the stockholders of the right to sue in the corporate name during the whole term of incorporation, and two years afterward, a forfeiture, that is the consequence of the cause to which that statute exposed the charter, does not divest them of the privilege.— *Ala. Dig.* 39, *Sect.* 10.

The holder of a bond, who acquired it by a transfer by delivery without endorsement, has a right to prosecute a suit on it for his use, in a case in which the nominal plaintiff dies, after the action was commenced, but before judgment. Would he not have a right to bring a suit for his benefit in the name of the obligee after the death of the latter? The latter case is within the mischief, for which a remedy is afforded by statute, and is therefore by an equitable construction within the meaning, although it is without the letter of the statute.— *Ala. Dig.* 70, 465 —6 *Bac. Abr.* 383, 385, to 388.

If the holder would have a right to an action in the latter case, Pope, for whose use this suit was brought, is entitled to it. He received a transfer of the bond by delivery within three years after the Governor issued his proclamation. The transfer was accompanied by a deed from the corporation, that

conveyed to him this and every other interest, which belonged to it and declared the trusts to which he should hold all subject. He has the same right to bring an action after the dissolution of the corporation as the transferee of an individual has, after the death of one from whom he received the transfer.

But the right of the corporation to sue or to do any other act, which the charter authorised, was not impaired by the statute of 1823. This act is unconstitutional and void. It provides a mode, in which the Bank may be deprived of its charter without allowing to the corporation a trial by jury, or any opportunity to make defence, and gives to the Governor *judicial* in addition to the *executive* power. The legislature did not intend, when they enacted this statute, to exercise the power to establish Courts inferior to the Circuit Courts, and to appoint the Governor a Judge of an inferior court. If they intended to do so, such an act is forbidden by the constitution. The Constitution prohibits the union in the same office of judicial and executive power—*Ala. Dig. 917, article 2d, and sect. 2, of the Constitution.*

That the power conferred by the act is judicial, no one can doubt. It declares what shall be the effect of a failure to pay specie; prescribes what shall be sufficient testimony of this fact; authorizes the Governor to ascertain it, and in the event of his believing, from the evidence, that the fact exists, requires him to deprive the corporation, by his proclamation of its rights. This is precisely the power which Courts exercise, after the facts of a case have been ascertained by a jury. Every right, whether it depend upon the common law or statute, must be

supported, if in controversy, by evidence of the facts upon which it rests. The effect of the facts the law has declared. They are ascertained in the mode which the law has prescribed, and it is the duty of a Court to see that facts are proved by competent testimony, and if they are to pronounce, not its own, but the judgment of the law, such judgment is the effect allowed by law to the facts.

The assent of the corporation to the statute is immaterial and does not relieve it from the objection. The assent of all the people in the State could not enable the legislature to do what the Constitution prohibits. If the legislature were now to enact that every collector of taxes hereafter appointed, should, as a condition precedent to the exercise of the employment, make, together with his securities, a written declaration of assent to a statute, which required the Governor, if it appeared from the certificate of the Comptroller that any collector had failed, on the demand of the Comptroller, to pay the taxes in his hands into the Treasury, to render a judgment for default against such collector and his securities, would not the statute be unconstitutional? Could the assent save it from merited condemnation? It would be no support to a judgment obtained in virtue of such a statute, to say the collector was bound by a legal obligation to pay the sum for which the judgment was rendered. This could be said truly to most persons of the effect of claims before suits are brought on them, upon which Courts afterward render judgments. The existence of obligation when it is asserted by one party and denied by the other, can be ascertained and fixed by the exercise of judicial power only. In the case which has been sup-

posed, the facts necessary to make a collector and his securities liable would be—was he appointed to the office—did he and his securities make the bond—did he collect the money and fail to pay it over. If these facts can be ascertained and their legal effect declared by a Governor's proclamation with the force of a judgment, the effect of facts necessary to fix an obligation on one individual in favor of another, may be also—if the legislature shall authorise it by a statute, which shall require all persons to submit by the terms of their contracts to the jurisdiction of this new tribunal. In what does the case supposed, differ from this? The Bank had rights as well vested by its charter and protected by the Constitution and laws of the land, as those of persons are. Amongst its most essential rights is that to the term of incorporation. The forfeiture of this right must be founded upon facts, the effect of which destroys it. Such facts can be ascertained in that mode only, in which those are that affect the rights of persons. The legal effect of such facts can be declared by a Court only. An obligation of the Bank in favor of others, like one on an individual, must be shewn by evidence. Did the Bank owe the note which was protested, or was it made by the corporation? This inquiry embraced facts and questions, which can be ascertained and settled no where else than in a Court. Did the Bank refuse to pay on the ground, that the holder was indebted to the corporation in a hundred times the amount of his demand? As to this fact the notary did not inquire, and had no authority to inquire. If the original charter of the Bank had given to the Governor authority to inquire into matter, which is by the common law a cause of for-

feiture, and power also, if he ascertained its existence, to adjudge the forfeiture, no one here would doubt the unconstitutionality of the authority. The statute of 1823 made the failure to pay specie a cause of forfeiture. Under the charter the failure had no such effect. But is not the inquiry into matter, to which the amendatory act allows that effect, confined as exclusively to the jurisdiction of Courts, as it would be, if made into a fact that would, according to the original charter, cause a forfeiture?

None need be alarmed for the consequences of a decision, that the statute is void. The capital of the Bank is too dispersed to be collected again. Some of it may be wherever the winds of Heaven blow. It has been exhausted in the payment of debts and in distribution amongst the stockholders. In January 1828, all the interests of the Bank were conveyed to a Trustee, to whom authority was given to close its concerns. If the operations of the Bank should be hereafter renewed, a judgment of forfeiture for non-user could be obtained. But the stockholders are satisfied with its present repose, and would not disturb it if they could. They remember that whilst it was in operation, it received no credit for the good it did, and was charged with many of the evils which it did not cause. Their consciousness of the integrity, with which they administered the affairs of the institution, does not make them willing to afford, by a renewal of its operations, another pretext for slander to assail them. They assert the existence of the corporation for the sole purpose of enabling the Trustee to recover the debts, which are justly due to it. Allow their Trustee to do so, and they are as willing as any other one can



be, that the Bank "may sleep the sleep that knows no waking."

PERRY, J.—This was an action of debt, the relative situations of the parties being the same in the Court below as in this Court. The defendant filed a plea, in which she alleged, that before the commencement of this suit the plaintiffs had forfeited their charter, and had ceased to exist as a body corporate, and were incapable of prosecuting any suit in their corporate capacity. The plaintiffs replied, that they were authorised by law to sue for and maintain all necessary actions for the recovery of debts in their corporate capacity, according to their charter. The defendant rejoined and took issue upon the plaintiffs replication. The cause upon the issue was submitted to a jury and a verdict rendered for the defendant. Pending the trial, a bill of exceptions was taken, which discloses that the plaintiffs produced and read to the jury the note executed to them on the fifth day of February, 1822, and upon which the action was brought, and also read the act incorporating the said Bank. On behalf of the defendant, was offered as evidence, a certified transcript of the records of the office of the Secretary of State, signed by him with the seal of the State annexed, dated the first day of February, 1823, by which it appears, that the stockholders of said Bank had assented to the provisions of an act passed by the Legislature, December the 31st, 1823, to amend the charter of said Bank, and transmitted an expose of the condition of said Bank, as required by said act, and the Governor's proclamation declaring the charter of said Bank forfeited in consequence

of a violation of said act, in not paying specie for a note issued by said Bank, which was presented for payment on the 16th day of December, 1824, and regularly protested for non-payment. The plaintiffs objected to the testimony going to the jury, but were overruled by the Court. The defendant then read as evidence, the act of 1823 to amend the charter of said Bank. The plaintiffs then requested the Court to charge the jury, that the writing purporting to be the Governor's proclamation, was not sufficient evidence, unless the same were proved to have been published, to authorise a verdict for defendant; which instruction was refused. The plaintiffs now assign for error :

First—That the Court erred in not excluding the evidence, offered by the defendant, from the jury.

Secondly—In refusing the instruction asked for; and,

Thirdly—That the issue was immaterial.

The first and second assignments may well be considered together, as they involve the disability of the plaintiffs to sue, and there can be no doubt but the Court erred in refusing to give an opinion as to the law upon the facts, when it was requested to do so. Such a refusal leaves the law to be determined by the jury, or at least it is calculated to lead them into error, by supposing that the law is on the other side. The Court then should have given the instruction asked for, and left the jury to decide upon the evidence. The refusal then, to give the charge asked for, being equivalent to an opinion that the law was with the defendant, I will proceed to shew that the plaintiffs were entitled to sue at the time this suit was commenced. The act of 1823, to amend

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HUNTSVILLE BANK VS. M'GEREE'S EX'N.

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the charter of said Bank, in the 2d section, enacts "that if at any time after the first day of August next, it shall be ascertained, by note regularly protested for non-payment, that said Bank has refused to pay specie for any note it has issued or may issue, then, and in that event, the charter of said Bank shall be forfeited, and the Governor is required to issue his proclamation to declare it null and void." The third section provides, that in the event of a forfeiture of the charter of said Bank being incurred under the provisions of this act, the stockholders thereof shall still continue to enjoy all their corporate powers unimpaired, for the term of three years from the date of the proclamation declaring said forfeiture. In the 10th section incorporating said Bank, *Digest*, page 39, it will be found that, notwithstanding the expiration of the term for which the said corporation was created, it should be lawful to use the corporate name, style and capacity, for the purpose of suits for the final liquidation and settlement of the affairs and accounts of the corporation, and for the sale and disposition of their estate, real, personal, and mixed, for two years after the expiration of the said term of incorporation. The act then of 1823, from the best construction I have been enabled to give it, only shortened the period, upon certain contingencies, which the charter of the Bank should run; and from the act referred to, and the date of the Governor's proclamation, it is evident that a forfeiture of the charter did not take place until the first day of February, 1825, and the act referred to, continued their corporate powers under certain restrictions for three years thereafter. The question then arises, at what time the corporation

ceased to exist; and I will here admit that the question would be beyond disputation, but for that part of the act of 1823, which continues their corporate capacity for three years after a forfeiture of the charter of said Bank, by which it is evident that the legislature intended the corporation to exist and continue the time designated, for all the purposes of banking, except discounts. So long then as the charter authorised the Bank to do banking business, it existed as a corporation, and at the expiration of the time limited, at which the corporation should cease to do banking business in its corporate capacity, then the corporation ceased to exist, and it would have to resort to the 10th section referred to, in order to enforce the collection of its debts, which seems to have been unimpaired by the act of 1823, to amend the charter of said Bank. The act then of 1823, amending the charter of said Bank, and the 10th section of the original charter not being in conflict, they may well stand in *pari materia*, and be construed as such, which would give the Bank two years after the expiration of the three, from the date of the Governor's proclamation, to commence suits, &c. The evidence was therefore proper under the issue, and the refusal to give the charge asked for, error.

As to the third assignment, that the issue was immaterial, it is believed that that assignment is not well assigned. An issue to be immaterial must be such as no judgment could be rendered upon it. The plea then was a plea in abatement as to the capacity of the plaintiffs to sue: upon that fact being found, the writ would have been abated, or being found for the plaintiffs, a *respondeas ouster* would have been awarded.

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SMITH, et. al. vs. ROGERS & SONS.

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A majority of the Court are therefore of opinion, that the judgment be reversed and cause remanded.

The other cases between the same parties are to abide this decision.

COLLIER, J. dissented from the opinion delivered by a majority, remarking, that he expressed no opinion upon the constitutionality of the act of 1823.

TAYLOR, J. and WHITE, J. not sitting.

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SMITH et. al. *versus* ROGERS & SONS.

In chancery, all parties whose rights can be affected by a decree, must be *made parties* to the suit, before that decree can be pronounced: but a sheriff, having the mere custody of monies, in litigation, is not such a party as to authorise the dismissal of a bill, because he is not joined.

An answer in chancery, responding to the allegations of a bill, and expressly denying them, will prevail, unless the bill be sustained by the testimony of two witnesses—or of one witness, and strong concurring circumstances. And proof of a fraud between two parties, in a separate and distinct transaction from the one in suit; will not be such conclusive circumstance as will sustain the allegations, denied.

In error from Limestone Circuit Court.

This suit was commenced by Rogers & Sons; by a bill in chancery, charging a fraudulent transfer of estate from John W. Smith, a judgment debtor of the complainants, to Joseph A. Smith. The answers of the Smiths denied positively the alleged fraud in the transfer—but it was in proof, that a transfer of certain slaves, made by John W. to Joseph A. Smith (which slaves were out of the jurisdiction of the Court) was attended by such circumstances, as would have induced a strong presumption of fraud—and it

was insisted that, that transaction should be extended to a transfer of a bond, made by the same parties ; and which the complainants alleged was in derogation of their rights as creditors of Smith, the assignor. No testimony was produced showing fraud in the assignment of the bond ; but on the bill, answer and proofs, the Court below decreed the proceeds of the assigned bond to the satisfaction of the complainants judgment against John W. Smith. It was here assigned for error.

1st. That the sheriff who held the custody of the money, collected on the bond, should have been made a party to the suit.

2d. That Barnes & Carroll who had an interest in the amount of the bond, should have been also parties, and

3d. That the Court erred in its decree, generally.

*J. L. Martin, and W. B. Martin, for Plaintiffs.*

*Hopkins and Coleman, for Defendants.*

CRENSHAW, J.—In this case the bill among other things, sets forth, that Rogers & Sons obtained judgment against John W. Smith for a large amount, and that Smith was then possessed of considerable property in land and slaves. That pending the suit he fraudulently sold the slaves, and which, soon after the sale, Joseph A. Smith removed to Florida. That he sold his land to Blackwood, in part payment for which he received a bond on the Webbs for \$1500, and which bond he fraudulently assigned to the said Joseph A. Smith, who in December 1827, obtained judgment thereon for one thousand five hundred and ninety three dollars.

The bill prays a discovery, and general relief; and especially seeks to apply the money collected, or to be collected on the judgment against the Webbs, towards the satisfaction of the judgment of Rogers & Sons.

Joseph A. Smith in his answer specifically denies the fraud, and insists that the assignment of the bond on the Webbs to himself, was fair, for valuable and adequate consideration, and which consideration was debts to that amount then due, and owing from the said John W. Smith to himself.

The answer of John W. Smith admits the judgment against himself in favor of Rogers & Sons, denies fraud in the transfer of the bond on the Webbs, and in this respect is substantially the same as the answer of Joseph A. Smith.

The record presents a mass of testimony, the parts of which I deem material, will be considered in their proper place.

On the bill, answers and proofs, the Circuit Court, in substance, decreed that the avails of the judgment against the Webbs should be applied towards satisfaction of the judgment in favor of Rogers & Sons.

The errors, if any, may be embraced in two objections to the decree.

1st. That a final decree should not have been pronounced, because, all persons to be affected by it had not been made parties; and,

2d. That the decree is erroneous on the merits of the case, and that it should have been in favor of the defendants to the bill.

As to the first objection, the position is taken, that the sheriff, who was enjoined from paying over to

the plaintiff at law the money collected on the judgment against the Webbs, should have been made a party. This position is untenable, because the sheriff cannot be affected in interest by the decree, nor has he any interest in the money collected on the judgment more than to the extent of his fees, and these he is entitled to retain whether he be a party or not.

But it is further insisted, that Barnes and Carroll had an interest in the judgment against the Webbs, to the amount of their debts, and for which an order in their favor had been accepted by the attorney of the plaintiffs at law; and that they should have been made parties, the judgment being the principal subject of controversy in the present suit.

In chancery, it is a correct rule of practice, that the Court will not pronounce a final decree, unless all persons whose rights are to be affected by the decree have been made parties. I am therefore inclined to think that Barnes & Carroll should have been made parties; and that for this error, if there were none else, the decree should be reversed, at least to the extent of their interest, unless the complainants would now consent to allow them the amount of their debts.

Other slight objections have been raised by the counsel, which I consider as not very material; but will now proceed to the consideration of the main error relied on, viz: the erroneousness of the decree itself, on the merits of the case.

And here I will premise, that as to the pretended sale of the slaves by John W. Smith and their removal to Florida, the bill, the answers and the depositions taken in connection shew that the transaction



was intended as a gross fraud, and must be declared void, at least so far as concerns the creditors of Smith.

But we have no authority to set aside the sale, and decree the property to be sold in satisfaction of the complainants judgment, because the slaves are out of our jurisdiction. And though the bill contains a prayer of general relief, yet I apprehend this matter was inserted in the bill, and proof offered in its support, in order to connect it with the assignment of the bond on the Webbs, and to show that the assignment was also intended as a fraud on the complainants. From the state of the case it can be resorted to for no other purpose, and for this purpose alone, I understand the counsel as relying on it in argument.

The principal matter then in controversy is, whether the assignment of the bond to Jos. A. Smith is fraudulent and void as to the complainants, who were creditors of John W. Smith the assignor, and who it seems is insolvent.

The bill expressly charges, that it was fraudulent, without consideration, and intended to prevent satisfaction of the complainants judgment, and calls on the Smiths, the assignor and assignee to state what in particular was the consideration; and they in their answers as expressly deny the fraud, set out the consideration in debts due and owing from the elder to the younger Smith, and insist on the right which a debtor has to prefer one creditor over another.

If the transaction be in good faith, a debtor has the unquestionable right to assign his property in payment of one creditor in preference to another.

The answers then, having directly denied the most

material allegations in relation to the fraudulent assignment of the bond, the rule is, that the answers, so far as they are responsive to the bill, must prevail, unless the facts be contradicted by two witnesses, or by one witness and other equivalent circumstances.

It is therefore important to enquire, whether the case furnishes such testimony as will destroy the effect of the answers.

I will first consider the assignment of the bond as a separate transaction, and distinct from the sale of the slaves, and running them to Florida.

The testimony of McCracken, proving that John W. Smith declared he would place his property beyond the reach of the complainants, and so much of the testimony of all or any of the witnesses going to prove declarations or admissions made by John W. Smith in the absence of Joseph A. Smith, and which may affect his rights, must be rejected as illegal and inadmissible: for if the answer, on oath, of a defendant cannot be read to charge his co-defendant, or to affect his rights, much less can declarations and admissions made not in the presence of each other, be received in evidence for the same purpose.

Rejecting this testimony, and viewing the transfer of the bond as unconnected with the sale of the slaves, there is not a solitary witness who directly contradicts the most material facts contained in the answer of Joseph A. Smith. I admit that several of the witnesses prove circumstances calculated to excite suspicion against the fairness of the transfer of the bond: but bare circumstances of suspicion, without the positive proof of at least one witness, are insufficient to do away the effect of the answer.

But if the evidence of the complainants had been

positive and in direct contradiction to the facts of the answer, is not the positive testimony of the three Smiths sufficient to balance the proof? They are equal in number to the witnesses, who prove any circumstance which can affect the fairness of the transaction, and for aught that appears to the Court, are of equal credibility. They prove clearly that there were subsisting debts due from John W. to Joseph A. Smith equal in value to the debt against the Webbs, and two of them prove that the bond was transferred in satisfaction of those debts.

If then their testimony be sufficient to clear the transaction in relation to the bond, of the suspicion of fraud, created by the witnesses on the other side, the answer of Joseph A. Smith, in this particular, stands alone unimpeached, and must prevail.

But it is contended that the sale, and running the negroes to Florida, are so intimately connected with the transfer of the bond, that they must be viewed as parts of the same transaction, and that a fraud in part vitiates the whole. I am unable to discover that they are parts of one and the same transaction. I cannot see any intimate relation between, or necessary dependence of one on the other, and the record furnishes no sufficient evidence of the fact. Because Joseph A. Smith was concerned in the fraudulent sale of the negroes and running them to Florida, it does not follow as a necessary consequence nor as a violent presumption that the transfer of the bond was fraudulent, when the answers of the defendants, sustained by the unimpeached and uncontradicted testimony of three witnesses, shew that the transfer was in good faith, for adequate and valuable consideration. I am not at liberty from mere cir-

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SMITH, et al. vs. ROGERS & SONS.

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cumstances, to ~~raise~~ presumptions and deduce consequences, which may or may not be true. The maxim, therefore, that fraud in part, vitiates the whole transaction, has no application to the present case. The transfer of the bond was one transaction, the sale and removal of the negroes was another, fraudulent indeed, but separate and distinct from the other.

From the premises, the conclusion necessarily follows, that the decree should be reversed, the injunction dissolved, and the bill dismissed with costs.

Of this opinion are a majority of the Court.

The CHIEF JUSTICE, and Justices SAFFOLD and WHITE concur.

TAYLOR, J. and COLLIER, J. dissenting.

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With the last Case, was closed the Decisions of the Supreme Court of Alabama, under its original organization.

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On the 14th day of January, 1832, the Legislature of Alabama enacted a statute creating a separate Supreme Court, the members of which, under an election held in pursuance thereto, were as follows:

Hon. ABNER S. LIPSCOMB,  
Hon. REUBEN SAFFOLD,  
Hon. JOHN M. TAYLOR.

The Hon. ABNER S. LIPSCOMB was chosen Chief-Justice.

# JUDGES

OF THE

## SUPREME COURT OF ALABAMA:

During the ensuing part of January Term, 1832.

**Hon. ABNER S. LIPSCOMB, Chief Justice.**

**Hon. REUBEN SAFFOLD, Associate Justice.**

**Hon. JOHN M. TAYLOR, Associate Justice.**

**CONSTANTINE PERKINS, Esq. Attorney-General.**

**HENRY MINOR, Esq. Clerk.**



# CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA:

(UNDER ITS NEW ORGANIZATION.)

JANUARY TERM, 1832.

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## CALDWELL *versus* THE STATE.

The State of Alabama has the undoubted constitutional right to extend its civil and criminal jurisdiction, over any tract of Indian country within her limits, where the Indian title is not extinguished.

The statute of 1829, extending the jurisdiction of the State of Alabama over the Creek nation, was not in violation of the Constitution of this State, or of the United States; nor of any act of Congress passed in compliance with the latter; or of any treaty made in pursuance thereof.

An offence committed in the Indian territory, to which the Indian title has not been extinguished, but over which territory the jurisdiction of the State Courts has been extended, is properly cognizable in the Courts of this State, and the conviction of one for felony on such lands, held legal.

This important cause arose on the conviction of Caldwell for the murder of a Creek Indian. The crime was committed on the lands of the Creek nation, the Indian title to which had not, at the time of the commission of the offence, been extinguished. In the year 1829,\* an act of the legislature of Alabama became a law, extending the jurisdiction of the State over the Creek nation; and in a correspond-

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\* See Aikin's Digest, page 223, sec. 6.

ing extension of the criminal jurisdiction of the Circuit Court of Shelby, this conviction was had.

The Circuit Court reserved the case for the consideration of this Court; and the points raised here, were as to the right of the State of Alabama to enact the statute in question.

It was insisted in error, that the act was in direct violation of the Constitution of the United States, and of the Treaties made with the Indian tribes. That the aggression was alone cognizable in the Federal Court, and that the State Court had no jurisdiction or control of the offence.

The great legal learning displayed in the decision of this question, and the important constitutional principles investigated by the Bench, cannot fail to render it an important document in the judicial history of the State; and especially interesting, as deciding a question, the political aspect of which has so long disturbed the country, and created such diversity of opinion.

*Gordon and Shortridge* for appellants.  
*Bagby, contra.*

LIPSCOMB, C. J.—It is with the most unfeigned diffidence of my own abilities, that I approach the interesting question presented in this case; not only on account of its intrinsic importance, but because it has employed the learning and talents of the most able and distinguished men of our country, without producing unanimity of public opinion. When such efforts have failed, I may well despair. As however it has been made my duty, I shall express such views on the subject, as have been satisfactory to my mind.



however erroneous and unsound, they may appear, to those for whom, I entertain the most profound respect.

I must beg leave to protest against the manner in which the subject has been generally treated in the forum, in the pulpit, and in the numerous newspaper essays, with which Philanthropy, has so liberally sought to instruct us in morals and the true science of government. The question is, not whether the Indian shall be consigned over, stripped of every right "that humanity is heir to," to be a subject of the most heartless, unrestrained, and diabolical despotism—that he is to be free and independent of all civil institutions, or hunted down as the beast of the forest, and made the property of the first captor. These consequences, have been conjured up by the overheated imaginations, of those, who deny the right of the States, to exercise jurisdiction over the Indians, but have no foundation in truth. If the Indian, is subjected to our laws, whilst in the chartered limits of the State, these laws, are also held over him as a shield of protection, not only against assaults on his rights, from his fellow Indian, but, against the lawless encroachments of the white man. Of this fact, there needs no stronger illustration, than the conviction we are now called on to review.

A white man is now under sentence of death for the murder of a Creek Indian, within the limits of this State, but on the territory occupied by the Creek Indians, and must expiate his crime by an ignominious death, unless we reverse the sentence awarded by the Circuit Court, on the ground of a want of jurisdiction.

It is contended, that the act of the Legislature of

Alabama, extending the jurisdiction of the State, and embracing that part of the Creek Nation where the offence was committed in the county of Shelby is void, because it is in contravention of that provision in the Constitution of the United States, that confers on Congress, the right, to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. If the argument of counsel, was correctly understood, it was urged that the power to regulate trade and commerce, confers plenary powers on the General Government, to legislate and exercise jurisdiction, over the Indians, of the several tribes, within the several States, in exclusion of the local or State jurisdictions. Were it admitted that the Indian tribes embraced within the limits of a State, are referred to, in this grant of power to the General Government, it would not necessarily follow, that the principle contended for is correct.

There is nothing in the exercise of State jurisdiction incompatible, with the right of the General Government to regulate trade and commerce—each jurisdiction can be sustained, whilst operating within its legitimate sphere. It is not competent for a State to exercise a jurisdiction, conceded to the General Government. But she may exercise all the powers of a sovereign independent State, within her own limits, if those powers have not been relinquished. The General Government is one of limited powers, and can exercise no sort of jurisdiction not conceded to it, by the Constitution. All the powers of sovereignty not conceded, remain with the states. Although the states may not be authorised to pass laws regulating trade and commerce, they may well take cognizance of murder, of larceny, and enforce con-

tracts not in contravention of such regulations of trade and commerce, as may be ordained by Congress. The plenary jurisdiction of the United States cannot extend beyond the subject of the grant to Congress. Trade and commerce have been subjected to its control, and to exercise it further would be destructive of all those salutary barriers, interposed for the protection of the states from federal encroachment. Admit the principle contended for, and the whole action of state jurisdiction would be arrested and subverted; for the terms used in the grant of power, refer as clearly to the states, as to the Indian tribes. This view, is on the hypothesis, that the tribes within the limits of a state are embraced by the Constitution; but its truth may well be controverted. Surrounded as our government was, at the period of the adoption of the Constitution, by numerous and barbarous tribes of Indians, not within our territorial limits, it is not to be supposed, that the power to regulate trade and commerce with them, would have been deemed too unimportant for the consideration of the framers of that instrument. The Indian tribes, were a description of people, not coming within any known definition of an independent sovereign nation or government; hence, they could not be embraced in the term, foreign nation. The term did not express the familiar idea entertained of those people; it was therefore essential to employ the more expressive one, Indian tribes. In connexion with this view of the subject, it is worthy of consideration, as a historical fact in federal jurisdiction, that it never has been assumed over the small tribes, within the limits of a state. I will leave it to others to determine, what is the standard of depreciation to which a tribe

must be reduced, to fall below federal jurisdiction. Another position assumed, in support of federal jurisdiction is, that the ultimate right of soil is in the United States, and that jurisdiction follows that right as its incident: this argument is novel and unsound. The United States has never rested its right of jurisdiction, over her Forts, Arsenals and Dockyards, on her right of soil; but has always applied to the state, for a relinquishment of jurisdiction. Chancellor *Kent* says, "that if the United States had been in "constant possession of a place as a Fort, from the "first organization of the government, but had not "obtained a cession of jurisdiction from the state, "the jurisdiction remains with the state."

\*1Com.404

Another ground assumed, is alike destructive of federal and state jurisdiction. It claims for the Creek tribe of Indians, the high character of independent sovereignty, entitled as such, to every political right incidental thereto. The Indians, it is said, were the first occupants of the soil; and the first European discoverers, acquired no right, except such as the Indians conceded to them. That possession acquired by force, conferred no right, as it was in violation of the paramount natural right of the original occupants. We will examine this high pretension to savage sovereignty. If a people are found in the possession of a territory, in the practice of the arts of civilization; employed in the cultivation of the soil, and with an organized government, no matter what may be its form, they form an independent community; their rights should be respected, and their territorial limits not encroached on. From such a people, territory can only be acquired consistently with good faith, and national law, peaceably by treaty; by con-

quest, in open war; or by a forcible trespass, in violation of political right. The first mode of acquisition, would be in accordance with the soundest principles of morality; the second, sanctioned by the uniform usages of war; the last would be morally wrong; and if the power whose rights had been invaded, was too feeble to extort redress, other governments would be justified in making common cause in enforcing right against the wrong doer. But if the usurpation was acquiesced in, the political aspect of such an acquisition would be in favor of the *jus possessionis*. The code of national law, by which political societies should be tried, to establish their national rank, is not one of express enactment; nor the result of any convention of assembled nations: but it is a system of elementary principles, to which, the influence of morality and propriety, has constrained all civilized nations, tacitly to yield their assent; and is now considered as binding and obligatory as if sanctioned by the most solemn treaties. Savage tribes without a written language, or established form of government, and wholly ignorant of the customs and usages of civil society, are not capable of appreciating the principles of this code; and, (not yielding obedience to its canons,) have never been looked on as parties to this compact of nations.

Were the natives of this vast continent, at the period of the advent of the first Europeans, in the possession and enjoyment of those attributes of sovereignty, to entitle them to take rank in the family of independent governments? They were composed of numerous tribes, subsisting by fishing and hunting, without any uniform or established system of government. Whatever authority exercised was adventi-

tious and temporary, passing from one warrior to another, as accident might determine ; and what was essential to national character, they had no geographical boundaries : under such circumstances the continent is discovered by the Europeans. What ought they to have done ? The fairest quarter of the globe is roamed over by the wildman, who has no permanent abiding place, but moves from camp to camp, as the pursuit of game may lead him. He knows not the value of any of the comforts of civilized life : he claims no definite boundary of territory. In what way is he to be treated with ? As well might a treaty, on terms of equality, be attempted with the beast of the same forest that he inhabits. If it were possible to treat with them, and a hunting camp should be purchased, the right of purchase would not extend beyond its confines : another tribe, or the same, might settle down at the immediate door of the purchaser. The Indians, until long after the first Europeans came among them, had no idea of any actual or ideal line of demarcation, between their several tribes. Tecumseh, in his celebrated speech, declares this, and complains that boundaries between the several tribes, were the result of arbitrary European imposition ; and this very tribe, that now assumes to be a sovereign, independent nation, within three quarters of a century back, claimed no territory beyond the smoke of the wig-wams ; and how near them their neighbors, the Choctaws, might approach in their hunting expeditions was dependent on the relative strength of the two parties. Long continued wars had been waged between these tribes—their battle ground was wherever they chanced to meet—until the humanity of the British government inter-

posed, (not as one friendly neutral sovereign between two belligerents) but it was as sovereign to his subjects, the King of England, by his agent, Col. Stewart, spoke on Indian Affairs. He calls himself their great father, and informs the assembled Creeks and Choctaws, that he had resolved to put an end to those bloody rencontres; that he would, in order to effect this object, mark out a line, running North and South between them—that the Creeks should not hunt West of that line, nor the Choctaws East of it. Never was there loftier, and more absolute language of command used by a Roman pro-consul, to an abject, subjugated province, than that employed by this representative of the British Crown to the Choctaws and Creeks. The line designated by him, was the first boundary line known between two tribes, then among the most numerous and warlike in North-America.\*

The civilized nations of Europe, had either to adjust among themselves, a fair, an equitable mode of acquisition, according to their own canons of morality and national law, or to leave this fair continent in the rude and savage state in which they found it. They reasoned, and reasoned correctly, that the right of the agriculturists was paramount to that of the hunter tribes.

The learned *Vattel* says, “the cultivation of the soil is not only to be recommended by government,

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\* I was present at a treaty held with the Choctaws, in October 1816, & heard the facts of Col. Stuart's ordering the Creeks and Choctaws to cease from hostilities, and his annunciation to them, of his determination to run a line of demarcation between the two tribes, testified to by respectable witnesses, who heard the orders when delivered by the British agent, and they also testified to the running of this line, and of its being the first ever known between them.

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quired by them than the savages actually occupied. Those treaties were no admissions of the Indians' right to the lands over which they occasionally wandered, in search of game or wild fruits. They were holden for the purpose of conciliating the savages, and was no more an acknowledgment of their right than the contribution levied by the Barbary cruisers, from many of the Christian powers. They were never considered by the Europeans, as independent sovereignties: they adjusted the boundaries of their different clans on this continent, without consulting the Indian tribes that might be included in those boundaries.

The present boundary line between the United States and the Republic of Mexico, was defined by treaty between the King of Spain and our government; and although it intersects many powerful and warlike tribes, no regard whatever is paid to them. It is the same as to the line between the American possessions of the Emperor of Russia and the United States. The United States have never, for a moment, lost sight of this right of jurisdiction, so far as to exclude foreign interference with the Indians within her limits.

At the Treaty of Ghent, an abortive effort was made by the British Commissioners, to have those Indians who had taken part with them, and who resided within the limits of the United States, included. Mr. Adams, the Secretary of State, in his instructions to Messrs. Gallatin and Rush, of 28th July, 1813, charges them, "not to concede any thing that would authorise the British to trade with the Indians within the limits of the United States."

About the commencement of Mr. Monroe's administration, in a Report made by Mr. Calhoun, then Secretary of War, on Indian Relations, he says, that we should determine what line of policy would be best to be pursued towards the Indian tribes, as most conducive to their improvement, without consulting them—or language of this import.

In the case of *Johnson vs. McIntosh*, Chief-Justice *Marshall* says, "the United States maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest, and gave them also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise." This is placing the tribes in their true condition of privilege, under our government—making it a question of policy, at what time, and to what extent, jurisdiction should be exercised.

If their numbers were small, and the action of civilized institutions could be brought directly to bear on them, jurisdiction has invariably been exercised, by the State, within whose limits they resided. If numerous, and detached from the vicinity of the white man, policy inculcated the propriety of treating their ignorance and their prejudices with lenity and forbearance, until they should become capable of appreciating the superior advantages of the arts and institutions of civilized society; but how long a particular line of policy should be pursued, and when and how changed, are political, and not judicial enquiries.

It has been the uniform practice of the United States, and of all European powers, claiming possessions on this continent, to assert their sovereignty

over such Indian tribes as resided within their respective limits; and in this, they have only acted in accordance with the principles, of the Laws of Nations: it is wholly impossible to embrace them in the family of National Governments, either on the ground of right of domain, or of empire.

*Vattel* has learnedly and conclusively shewn, that a mere travelling over a country, and occasionally erecting a monument, without occupying and cultivating the soil, is not sufficient, to give a title to the domain, nor to empire; and that the pretensions of those who live by the chase, must yield to the cultivator of the soil.

There is, therefore, no soundness in the position assumed, that the savages had a right to prohibit the pilgrims from settling and cultivating a part of the soil used by them for hunting grounds.

The state of Georgia, before she ceded the territory now composing the two states of Alabama and Mississippi, to the United States, exercised, in her sovereign capacity, not only her political right of empire, but asserted her right to the soil, over the very territory from which it is now attempted to exclude the jurisdiction of Alabama. This was done by selling the fee of the soil, to certain purchasers called and generally known as the Yazoo speculators. When this sale was made, the Creek Indians were, as now, in the quiet possession, as far Indian occupancy could give such possession of the land sold. And they were then much more powerful, and from their numbers and warlike character, better entitled to rank among independent nations, than they are at present. Yet the Supreme Court of the United States, in the case of *Fletcher* and *Peck*, sustained the validi-

ty of the sale. If the United States have formed treaties with Indian tribes, residing within the limits of states incompatible with the right of state jurisdiction over them, the authority to enter into such arrangements with the Indians, must be derived from the constitution; otherwise those *quasi* treaties can avail nothing against the rights of the state. We have shown that the constitution gives no such authority. The enquiry therefore, how far any of them may interpose a bar to the exercise of jurisdiction, will be waived. If, however, it were admitted, for the sake of argument, that those treaties, at the time they were entered into, were valid, it might well be contended, that so far as Alabama is concerned, they have been abrogated. It is competent for Congress to annul a treaty, and this may be done expressly or impliedly. The making of treaties and the breaking them, are acts of political sovereignty in the government; and whether the principles of private or public justice has been violated, can not be enquired into by the judicial tribunals of the country.

Whatever the obligations might have been, subsisting between the U. States and the Creek Indians, if capable of being characterised at all, must have been of a political character. In treating with the people of the now state of Alabama, on the subject of their assuming the rank of an independent state of the Union, no reservation is made in favor of the rights of the Creeks, and no reference to the relations that might then be subsisting between that tribe and the United States. The act authorising the people of the Alabama territory to form a state government, is as solemn an act as Congress could have entered into. On accepting the terms offered, the people became

an independent state, entitled to all the rights of sovereignty and domain, not expressly reserved in the act of admission, or by the constitution of the United States; and to none more clearly than the jurisdiction over persons and property, co-extensive with her limits. The jurisdiction of a Government and its limits, are so intimately associated, that the terms may be considered as synonymous. If Congress, in defining the boundaries of Alabama, has been guilty of an act of injustice, however flagrant, against individual right, or against the rights of another government, the remedy, if any, must be sought through the political action of the government, and not through its judicial tribunals. The United States took forcible possession of Mobile, from the Spaniards, alleging that it was included in the Louisiana purchase, and extended her jurisdiction to the full extent over persons and property; those people complained, that this never was a part of Louisiana; but it was not possible to make it the subject of judicial inquiry, because it was exclusively a political question. The only condition imposed by the act of admission, on the people of Alabama, in favor of the United States, is, that they shall relinquish all right to the waste and unappropriated lands within her limits. If it had been intended by Congress, that the ultimate sovereignty, after the Indian title had been extinguished, should alone be granted, the insertion of such a provision could easily have been made, in designating our boundaries, and the necessity of so expressing it. would readily have suggested itself.

The extension of the limits of Shelby county, is not repugnant to our State Constitution: so far

from it, that the framers of that instrument, seem to have contemplated the division of the State, co-extensive with its limits, into counties. The 17th section of the 6th article, is in the following words: "The General Assembly shall, at their first session, which may be holden in the year eighteen hundred and twenty-eight, or at the next succeeding session, arrange and designate boundaries, for *the several counties within the limits of the State, to which the Indian title has been extinguished*, in such manner as they may deem expedient; which boundaries shall not be afterwards altered, unless by the agreement of two thirds of both branches of the General Assembly." By limiting the provision for giving permanency to county boundaries, to the counties in which the Indian title had been extinguished, it leaves the inference clear, that the members of the Convention supposed that there would be counties in which it was not extinguished. I must conclude, that in whatever aspect the question can be viewed, there is no soundness in the objections taken to the jurisdiction in the Court below; and, in the language of Judge Spencer, I know no half way doctrine on the subject: we have either exclusive jurisdiction over the Indians, co-extensive with our limits, or we have no jurisdiction over them on the smallest reserve that they may reside on, even if secured to them in fee.

The British government, before the revolution, exercised absolute dominion over the Indians within her limits in such way as policy dictated:—that all the right of sovereignty exercised by that government vested in the states, not collectively, but severally, within their respective limits; that this sove-

reignty remains with the states to the full extent exercised by the British Crown, if not abridged by concessions made to the Federal Government; that the state of Georgia, prior to the act of Cession, could lawfully have exercised jurisdiction, and that all the right of jurisdiction is now in the state of Alabama, are the conclusions that I have arrived at, from the best reflection I have been able to bestow on the subject, and that consequently, there is no error in the record of the conviction in this case, and that the same must be affirmed.

**SAFFOLD, J.**—The trial was had at the Fall term, 1831, in the Circuit Court of the county of Shelby. The subject of the homicide was a Creek Indian, and the slayer a white man, citizen of this state. The crime was committed in the tract of country to which the Creek title has not been extinguished; but over which the statute of the State, of 1829, entitled "an act to extend the jurisdiction of the State of Alabama over the Creek Nation," purports to extend the boundaries of the county of Shelby; and also the jurisdiction of the Circuit Court of said county. It was contended on the trial, in the circuit court, by the prisoner's counsel, that the statute referred to, extending the limits and jurisdiction of the county, over the Indian territory, was unconstitutional and void, and consequently the Court had no jurisdiction of the alleged crime. The Court sustained its jurisdiction, but at the request of the prisoner, and on the authority of a statute of the State, reserved the question of jurisdiction, for the revision of this Court.

On the record thus brought up, it is now assigned for error, that on the trial below, the Judge sustain-

ed the jurisdiction of the Circuit Court, when the only proper and constitutional tribunal to try the offence was the Federal District Court.

The question of jurisdiction is one of the highest importance, in the various aspects in which it can be viewed. The authority of the States, whose limits include tribes of Indians, (at least two or three in this section of the Union,) has, for years, become a general, fruitful theme of declamation and eloquence—of remonstrance on one side, and of assertion of right on the other. By some, no subject has been thought more worthy the attention of the politician and legislator, for the furtherance of civilization among the Indians, and the more regular government of their portion of the country; by others, none better suited to enlist the sympathy of the philanthropist, in defence of what is contended to be their exclusive right of empire. The gravity of the question, and the deep interest of the subject, are alike calculated to engage the enlightened reflections of the statesman, and the prejudices of the enthusiast; nor is it wonderful, however lamentable, in times of great political excitement, that the question should mingle in the schemes of party strife.

Yet it may be hoped that this latitude of object and design, will be confined to those who are more at liberty to indulge private desires and prepossessions; that the Legislative and Executive departments of our governments, (though exposed to party contests,) have proceeded; and will continue to act, on similar subjects, with due regard to moral obligation, as well as political duty; and that the Judiciary, more especially, whose situation may be more favorable to quiet research and cool reflection, and whose



decisions are of the greatest consequence to the cause of justice, and the harmony of society, will be found capable of discharging their solemn functions, on this as well as other questions, from the dictation alone of profound reflection and included judgment. From the relative condition, however, of the slayer and deceased, in this case, if the citizens of the State should be affected by prejudice or sympathy, the natural presumption is, that such extraneous influence would operate in favor of the prisoner, because a citizen.

Is the statute in question repugnant to the Constitution of the United States, or any act of Congress passed in pursuance thereof, or any treaty (in the constitutional acceptation of the term) made under the authority of the United States? These, with the Constitution of our State, constitute the supreme law of the land; and however deliberate and reluctant the judiciary should be, in overruling an act of the Legislature, if one be found clearly irreconcilable with the paramount law—being in conflict, both can not operate—then, as an unavoidable consequence, the supreme authority must prevail.

No view of the case can be more material to the question, than that which relates to the true character, or national grade of the Creek tribe, within the chartered limits of Alabama, at the date of the statute—whether they should be regarded as a *foreign nation*, or *State of the Union*; or if neither, what other title is descriptive of their state and condition? Connected with these enquiries may arise reflections on the effect and consequences of the principles, supposing them decided either way.

It is essential to the enquiry, to investigate, not only the right of the tribe to distinct sovereignty, and the extent of federal power over their territory, but also, in illustration of those, to examine their title or interest in the soil they occupy. The latter question, however, has been frequently adjudicated by the highest tribunals in the United States; and the several decisions have been uniform, and such as command my full concurrence. These decisions maintain, that on the discovery of this immense continent, all the great nations of Europe, who had thereby acquired what they considered titles to distinct portions of it, concurred in establishing the principles "that discovery gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession." Also, that "the exclusion of all other Europeans necessarily gave to the nation making the discovery, the sole right of acquiring the the soil from the natives, and establishing settlements upon it."—*Johnson vs. McIntosh*.

\* 8 Wheat.  
543.

Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians.—That relation necessarily impaired, to a considerable extent, the right of the original inhabitants; and an ascendancy was asserted, in consequence of the superior genius of the Europeans, founded on civilization and christianity, and of their superiority in the means, and in the art of war. The nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the right to grant a title to the soil, subject only to the Indian right of occupancy. The history

of America, from its earliest discovery, and especially the practice of Spain, France, Holland and England, prove the general recognition of this principle.—(See *Fletcher vs. Peck*—*Jackson vs. Hudson*.)

The same authorities shew that the United States adopted the same principle; they also declare the exclusive right to exist in the general or state governments, (according to subsisting relations between them) to extinguish the Indian title by purchase or conquest—to grant the soil, *and to exercise such degrees of sovereignty over the territory, as circumstances may require*; and that this right has never been judicially questioned.

The case of *Goodall v. Jackson*, decided at Albany, about the same time with that of *Johnson vs. McIntosh*, at Washington, maintained, that the government of New York had always claimed the exclusive right to extinguish the Indian titles to lands within their jurisdiction, and that all purchases made by others were null and void.

The legislature of Virginia, in 1779, says Chancellor Kent,<sup>4</sup> “asserted the same exclusive right of pre-emption; and the colonial and state authorities throughout the union, always negotiated with the Indians, within their respective territories. as dependent tribes, governed, nevertheless, by their own chiefs and usages, and competent to act in a national character, but placed under the protection of the whites, and owing a qualified subjection, so far was requisite for the public safety. The Indian tribes within the territorial jurisdiction of the government of the United States, are treated in the same manner; and the numerous treaties, ordinances, and acts of Congress, from the era of our independence, down to the present time, establish the fact.”

<sup>46</sup> Cranch,  
87.

<sup>33</sup> Johns. R.  
377, and 3  
Kent's Co.  
308.

<sup>20</sup> Johns.  
R. 69.

<sup>30</sup> Com. 311

In order more perfectly to comprehend and appreciate the principles of right, as established by the potentates of Europe, and to determine the relative state of the tribe in question, it is necessary briefly to investigate the early history of the title of the Indians to the soil, and the stipulations of various treaties to which they were parties.

The territory in question, having been a part of the colony chartered to Georgia, it was, in 1802, discovered, by the articles of agreement and cession between that State and the United States; consequently the origin of title to the Creek land, as well as its subsequent state in most respects, has been the same in Georgia and Alabama. The charter of the British King, in reference to these lands, contained, among other grants, the following declaration: "that it is our royal will and pleasure, *for the present* as aforesaid, to reserve (the land aforesaid) unto our sovereignty, protection and dominion, for the use of said Indians, and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases, or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license, for that purpose first obtained." This language is a clear indication of the assumed right of the British government to grant the future license, at pleasure.

The construction of this charter, by the Supreme Court of the United States—*Fletcher v. Peck*—as declared by the *Chief Justice*, is, "that the reservation for the use of the Indians, appears to have been a *temporary* arrangement, suspending, for a time, the settlement of the country reserved, and the powers of the Royal Governor within the territory reserved:

but is not conceived to amount to an alteration of the boundaries of the colony." He further, remarks, "if the language of the proclamation be in itself doubtful, the commissions subsequent thereto, which were given to the Governors of Georgia, entirely remove the doubt."

Looking to treaties, which may be considered obsolete, except for the purpose mentioned, is found in the one between Georgia and the Creek nation, concluded at *Galphinton*, in 1785, *art. 1*, the admission, on the part of the Creeks, "that the said Indians, for themselves, and all the tribes, or towns, within their respective nations within the limits of the state of Georgia, have been, and now are, *members of the same*, since the day and date of the [original] Constitution of said state of Georgia." The 4th article stipulated, if any citizen of Georgia, or other white person, committed any capital crime, on any Indian, he should be delivered up and tried by the laws of Georgia. And by the 5th article, the nation bound themselves to inflict adequate punishment on all like offences by Indians on white persons. The treaty at *Shoulderbone*, the succeeding year, did not vary the relations in any material respect.

By the treaty of New York, in 1790, between the Creeks and United States, the latter having become the proper party, in virtue of the Federal Constitution, then recently adopted, the Nation acknowledged themselves under the protection of the United States alone; and stipulated not to hold any treaty with any individual State, nor with individuals of any State. By the same, the United States guaranteed to the Nation all their lands in the United States;

it stipulated that any citizen of the United States, who should attempt to settle on any of the Creek land, should forfeit their protection, and the Creeks might punish such at pleasure; and further, that no citizen of the United States should attempt to hunt or destroy game on the Creek land; nor should any go into their country without a passport. This treaty further provided, if any Indian should commit any capital crime on any citizen, the offender should be delivered up to be punished by the law of the United States; it was the same if any citizen should commit such crime in the Nation.

The treaty of *Colerain*, in 1796, authorised the President to establish trading, or military posts on the Indian lands; that the same, with land five miles square, to each, should be under the government of the United States; but when they ceased to be necessary, they should revert to the Indians: *provided* nothing therein should "be construed to affect any claim of the State of Georgia to the right of pre-emption," &c., "*or to give to the United States, without the consent of Georgia, any right to the soil, or to exclusive legislation over the same, or any other right than those mentioned.*"

Nothing contained in the treaty of 1803, or that of 1806, cited in argument for the prisoner, is thought material; unless it can be, that the latter allows to the United States *a horse path* from Ocmulgee to Mobile.

The authorities remaining to be reviewed, are deemed more material. By the articles of agreement and cession, between the United States and Georgia, all the right, title, and claim, which the said State had to the jurisdiction and soil of the ter-

ritory, part of which composes Alabama, was ceded by Georgia to the United States, on, and subject to, express conditions—one of which was, that the territory thus ceded, should form a State, and be admitted as such into the union, in an event, that has occurred, on the same conditions and restrictions, with the some privileges, and in the same manner as is provided in the ordinance of Congress of the 13th of July, 1787, for the government of the western territory of the United States; which ordinance it was agreed should, in all respects, extend to the ceded territory.

One of the most essential privileges thus secured to the inhabitants of the territories was, that whenever they should contain the requisite population, they should be admitted, by their delegates, into the Congress of the United States, *"on an equal footing with the original States, in all respects whatever."*

In 1819, an act of Congress was passed "to enable the people of the Alabama territory to form a Constitution and State government." It authorised a Constitution, placing the new State "upon an equal footing with the original States, in all respects whatever;" but exacted as a condition, that the Constitution should be *republican*, and not repugnant to the ordinance referred to.

The same act submitted propositions to the Convention, for their free acceptance or rejection; which, if accepted, were to be obligatory on the United States. They related to the grants, of the 16th sections—of the Salt Springs—the reservation of 5 per cent. of the proceeds of the public lands, for internal improvement—and the reservation of land for the use of a Seminary. The only condition or equiva-

lent required, was in the form of a *proviso* to the grants, that the Convention should agree, by an ordinance in behalf of the people, that they forever disclaim all right and title to the waste, or unappropriated lands—that the public lands should be exempt from taxation, for five years after sold—that lands of non-residents should not be taxed higher than those of residents—that there should be no tax on lands, the property of the United States; and that all the navigable streams in the State should remain free, public high-ways.

A Constitution was accordingly adopted, similar in its provisions to those of most of the other States of the Union—no less republican—no less independent. The propositions were also accepted on the terms proposed.

Nothing appears to have been thought or said of the propriety of any stipulation limiting the sovereignty of the State in favor of the Indian tribes, nor the Federal Government. Had Congress deemed it expedient and constitutional, in the admission of the State into the Union, to restrict her rights of sovereignty respecting the Indian tribes within her chartered limits, it would appear to have been no less necessary, than to require the disclaimer respecting the waste and unappropriated lands, or the right of taxation, &c. All these charters clearly contemplated the right in the State, at no distant day, to increase civil and criminal jurisdiction over all the inhabitants of the State, co-extensively with its limits.

The articles of agreement and capitulation, concluded at *Fort Jackson*, and ratified in 1815, from its more recent date, and the circumstances which led to it, may be consulted relative to the existing rela-



tions between the federal and state governments, and the Creek tribe of Indians; so far, at least, as these relations depend on the state of *treaties* with Indians inhabiting a state of the union. It is not that this treaty, or capitulation, declares any great change in the condition of the tribe, within their circumscribed limits; but we understand, as historical facts, and which are declared by the instrument itself, that the nation had violated, by wanton and cruel acts of *hostility*, all former treaties between them and the United States; and consequently had forfeited all claim of protection, or other rights, previously secured to them by treaty. By this latter treaty, all the former stipulations were renewed, which were deemed necessary and proper to be continued, and to which the United States consented, viz: that they would "guaranty to the Creek nation the integrity of all their reserved territory;" that the nation should abandon all communication with any British, or Spanish post, garrison, or town; and should refuse to admit among them, any agent, or trader, without license from the President; that the United States should have the right to establish military posts, and trading houses, within the guaranteed territory; and a right to the free navigation of all its waters; and that permanent peace should exist between them and the United States, and the neighboring tribes.

This examination is sufficient to shew, that nothing in the early history of the Creeks, or in the subsequent treaties to which they are a party; nor in the political relations between this state and the United States, can have the effect to extend the empire of the tribe, or to deny to this state any of the powers of sovereignty which properly belong to other states

of the union, within whose limits tribes of Indians reside. The circumstance of this state having no claim to the soil occupied by the Indians, is immaterial to the question of sovereignty. They having only the *usufructuary* interest, whether the *fee* be in this state or the United States, is a matter in which the Indian tribes have no interest or concern. Nor does the right of *ultimate domain* in the United States, warrant the increase of extraordinary federal jurisdiction over the same country, as I shall presently attempt to prove.

Hence it results, that all the powers and prerogatives, claimed and established by the potentates of Europe, over the tribes within their respective dominions in America, may, with no less propriety, be applied to the Creek tribe by our governments. As a further illustration of those rights, in the view of the Federal Judiciary, further reference may be had to the opinion of the Supreme Court, in the case cited of *Johnson v. McIntosh*. *Marshall*, Chief Justice, says, the United States maintain, as all other nations have done, "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase, or by conquest; and gave also, a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."

Again, the same opinion declares that the British government, which was originally ours, and whose rights have passed to the United States, "asserted a title to all the lands occupied by the Indians, within the chartered limits of the British colonies. It asserted also, a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave them. These claims," says he, "have

*been maintained and established as far west as the river Mississippi, by the sword.*" And further, that, "however this restriction may be opposed to natural right, and to the usage of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly can not be rejected by Courts of justice."

As respects the pretension of empire in the Indian tribes, within the chartered limits of the states, it is a claim which has been found to involve incalculable difficulty and embarrassment; and such must be the unavoidable consequences of it, so long as the evils of conflicting sovereignty are perpetuated. It is, however, a subject, concerning which, the Supreme Court of the union has recognized principles assumed by the states, which that Court cannot retract, and which the states cannot yield.

In "*The Cherokee case*, (Jan. 1831,) *Marshall* Chief Justice, in declaring the opinion of the Court, remarks, "the bill requires us to control the legislation of Georgia, and to restrain the execution of its physical force. The propriety of such an interposition by the Court, may be well questioned. *It savours too much of exercise of political power, to be within the province of the judicial department.*"

In the same case, and in reference to the same claim of Indian sovereignty, in opposition to that of the state, *Johnson*, Justice, observes, "I cannot entertain a doubt that it is one of a *political character altogether, and wholly unfit for the cognizance of a judicial tribunal*: there is no possible view of the subject that I can perceive, in which a Court of jus-

tice can take jurisdiction of the questions made in the bill."

The fact that the Indian tribes, while remaining in their truly anomalous state and condition, have been, *ex necessitate*, allowed to maintain the relations of peace and war, does not prove their right to general empire. The general government has been, and must remain, incompetent to the extension of general municipal authority over tribes in the situation of these; because, the power has not been delegated by the states, and to do so, would violate state sovereignty. In this state, as well as some others, it had, until recently, been considered, by the ruling power, impracticable, or inexpedient, (and perhaps some thought it unconstitutional) to extend state jurisdiction over the resident tribes. While, therefore, such has been the situation of the tribe, and they were necessarily left to govern themselves as they chose, the United States have occasionally exercised the relations of peace and war with them; but in doing so, the nation has never thought it necessary to observe the checks and restraints which the Constitution has thrown around the *war-making power*. By the Constitution, Congress alone has power "to declare war;" but after many wars have been waged with various tribes, our Code of statutes contains no declaration of war against *Indians*. The several tribes having been placed under subjection to the United States, and located within the same, the power to suppress resistance, or any internal commotion by them, and to punish any hostilities they may commit, is necessarily incident to the national sovereignty; and to the duties of the commander-in-chief, in preserving, protecting and defending the Constitution.

Were it necessary, for the consolation of the philanthropist, longer to discuss the rights of the government to exercise the powers assumed, and of the citizens to share the wilderness with the aborigines, the authority of *Vattel*—*Book 1, ch. 18, sec. 209*—may be invoked: he says, a celebrated question to which the discovery of the new world has principally given rise, is, whether a nation may lawfully take possession of some part of a vast country, in which there are none but *erratic nations*, whose scanty population is incapable of occupying the whole? We have already observed, in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to *settle and cultivate*." Further, he says, "the earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had, from the beginning, resolved to appropriate to itself a vast country, that the people might live by *hunting, fishing and wild fruits*, our globe would not be sufficient to maintain a tenth part of its inhabitants. We do not therefore deviate from the views of nature in confining the Indians within narrow limits."

No founder of any American colony has been more generally, or perhaps more justly eulogised, for his moderation and humanity to the Indians, than William Penn. He has rendered his fame immortal by his acknowledged generosity or magnanimity in *purchasing lands of the Indians*, instead of taking them under his *British charter*, as all concede he, and others, had authority to do, and as they must have

had, to entitle them to encomium for forbearing to do so.

The same writer says, "we can not help praising the moderation of the English Puritans, who first settled in New-England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians, the lands of which they intended to take possession. This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania."

We can not, however, suppress the reflection, as the fact constitutes part of our authentic history, that the prices given by the Puritans, (Penn and others,) were scarcely more than nominal, compared with the then value of the lands: or with the prices which the United States have repeatedly offered to the various tribes in different states. The prices originally given, were doubtless, in most instances, less, and so considered, than would have been the expense of occupying the same lands, forcibly, against the consent of the Indians; nor is it to be forgotten, that the Indians were then numerous and formidable; and that policy may have been strongly united with humanity in dictating the terms by which the Indian titles were extinguished.

It is gratifying to know, that liberal and humane as the United States have uniformly been in relation to the aboriginal inhabitants, the course of the Federal Government, continues to evince no less magnanimity; that, (notwithstanding complaints of some to the contrary) the national character in this respect, never shone with more lustre than at present: that from motives of humanity, and a regard to long usage and custom, the General and State Governments acknowledge the right of all the tribes, as well in the

States as Territories, to the occupancy of their lands; their right to cede them to the United States, or an individual State, according to the circumstances; and their right to protection, &c.

The facts are also identified with the history of our country, that the government continues its uniform practice of tendering to the Indians, (such as have not yet accepted,) more than just and liberal inducements to relinquish their right of occupancy within the States, and emigrate to the west; that it has evinced the utmost solicitude to avoid coercion against them; that among other means used to avoid the necessity, and tempt them to move, it has tendered an extensive grant of lands West of the Mississippi—one, not included within the chartered limits of any State—better adapted to the habits and pursuits of the Indians than their present restricted and exhausted possessions; and where they can have, not only the absolute right of soil, but different and higher assurances of less restricted empire.

It has long been the settled policy of the government, to prevent, if possible, by negotiation with the tribes, any conflict of sovereignty, or other rights, between them and the States they inhabit; and which would doubtless have succeeded ere this, with the Alabama tribes, had not the cupidity of the more artful few, triumphed over the servility of the more ignorant majorities. Under such circumstances, the sympathies to arise in their favor, from the exercise of State sovereignty over them, would appear less rational than fanatical.

To maintain the position I assume, that the propriety of extending the jurisdiction of the State, involves a question of *expediency*, the fact is material,

that by various cessions, by the Creeks, and the consequent separation of their tribe from all others except the Cherokees, the size of their territory had been greatly reduced ; and that by emigration the same effect had been produced on the number of inhabitants. The reduction had been such before the date of the statute in question, that this tribe were not, I conceive, distinguishable, in principle, from many of the tribes, or remnants of Indians, remaining in many of the States of the Union, over which the respective governments have long exercised jurisdiction.

The fact has not escaped me, that there is nothing in the record shewing the original size or reduction of the Creek Nation ; but it is equally true, that there is nothing shewing that they are not the smallest remnant, totally incapable of the most abject government.

Hence, if the size of the tribe be material, reference to the history of the country is unavoidable, and may be rightfully had in all such cases. That the size is material, to sustain the argument, that the question is one of expediency, to be decided by the Legislature, appears to me to be evident, from the known fact, that the different States and Territories of the Union, contain tribes of every grade and number, from the most powerful to the most insignificant, imaginable.

It will be seen from the statutes of the different states, that many of them, before and since the adoption of the Federal Constitution, have exercised the right of passing laws in relation to the Indians within their limits ; not only to secure and protect the lands, and regulate commerce between them and the



whites; but, in many instances, they have subjected the Indians to ordinary municipal regulations; and more generally, have extended criminal jurisdiction alone, over their territory.

Of the various acts of the kind referred to, a few only need be noticed; and first, one of New York, passed in 1822, entitled "an act declaring the jurisdiction of the Courts of the State," and pardoning *Tommy Jemmy*. The preamble recites, among other state rights, that "the sole and exclusive cognizance of all crimes and offences, committed within this state, belongs, of right, to Courts holden under the Constitution and laws thereof, as a necessary attribute of sovereignty, except only crimes and offences, cognizable in the Courts deriving jurisdiction under the Constitution and Laws of the United States."—And further, that "it has become necessary, as well to protect the said Indian tribes, as to assert and maintain the jurisdiction of the Courts of the State, that provision should be made in the premises"—therefore, the act proceeds to declare full power and jurisdiction accordingly. By the same act it was declared, that *Tommy Jemmy*, an Indian of the Seneca tribe, having been indicted for the murder of an Indian woman of the same tribe, committed within the same reservation; and it having been represented, that the alleged murder had been committed under pretence of Indian authority—therefore, he should be pardoned.

Thus the great state of New York has asserted sovereignty over Indians, who, according to the language of the Court of Errors, of that state—*Goodell vs. Jackson*—"once formed the fiercest and most formidable confederacy of Indian republics ever known

20 Johns.  
693.

in *North America*; and who, by their prowess and enterprise, held distinct tribes of Indians under dominion and tribute;" but who, after the settlement of the colony, and their communication with the whites, had degenerated and descended, by gradual, but perceptible degrees, from their original elevation.

\*20 Johns.  
183.

In a previous trial of the case here referred to, before the Supreme Court of that state,\* *Spencer*, Chief Justice, in delivering the opinion of the Court, on the same subject, remarks, "we do not mean to say that the condition of the Indian tribes, at former and remote periods, has been that of subjects or citizens of the state. Their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon, and subject to our government. I know of no half way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the Indians, or we have no jurisdiction over their lands, or over them, whilst acting within their reservations. It cannot be a divided empire; it must be exclusive as regards them, or us." It is said there were then about 6,000 *Indians in New York*.

The Court of Errors reversed the judgment of the Supreme Court; but the merits of that controversy are immaterial to the question before us; the language of those Courts is quoted only to shew the light in which Indian tribes, residing within the chartered limits of other states of the union, are viewed by them. The opinion of the Court of Errors, also denied, that these Indians were citizens of the state, and remarked, "one community may be bound to another, by a very unequal alliance, and still be a sovereign state."

that, "though a weak state, in order to provide for its safety, should place itself under the protection of a more powerful one, yet according, to *Vattel*,<sup>•B. 1. c. 1. sec. 5 & 6.</sup> if it reserves to itself the right of governing its own body, it ought to be considered as an independent state." There are several kinds of submission, says this same Jurist.<sup>•B1.ch.16. sec. 194.</sup> The submission may leave the inferior nation a part of the sovereignty, restraining it only in certain respects, or it may totally abolish it, or the lesser may be incorporated with the greater power, so as to form one single state, in which all the citizens will have equal privileges."

That Court, I think, failed in their attempt to identify the Indian tribes with allies of the first description. They rely, mainly, on the position, that the Indians were not subjects, born within the per-view of the law, because not born in obedience to the state, but under the dominion of their tribes. What would be the weight of this argument, if the superior power had, or should assert and maintain its claim of exclusive sovereignty, under the right of discovery and conquest, or either; that the Indians should cede all their lands and remain in the state; or ceding part or none, should dwindle to a condition so degenerate and feeble as to be wholly incapable of self-government; which latter, the legislature of that state declares to have been their condition in 1822; at least, that the legislation of the state had become necessary to the protection of the Indians. This doctrine of partial sovereignty, remaining in the inferior, by the terms or submission, I consider entirely incompatible with the sovereign rights of the states within their chartered limits; and no less inconsistent with the political relations of the general and

state governments, as established by the letter and spirit of their Constitutions. I maintain that this reservation of partial sovereignty cannot exist, *within the states*, as a permanent obligation, either to the United States, or the Indian tribes; that it can exist only as a matter of comity, expediency, or policy, in the discretion of the states respectively; and continue so long only as these motives shall command the forbearance of the state.

The Court of Errors, however, predicated their decision and reasons, mainly, on the condition of the Indians forty years previously, (when they were much more fierce and formidable,) at which time, the right then in contest was said to have accrued. In allusion to the act of that state, of 1822, asserting jurisdiction and pardoning the Indian, they say, "admitting that this act completely annihilated the national character and sovereign attributes of the *Six Nations*, what has this fact to do with the inquiry, how those relations stood forty years ago," when the right in question vested? they do not expressly deny the power of the state to *annihilate* the sovereignty of the nation; but decide they had not done so at the time referred to.

There would appear much less difficulty in identifying the New York Indians, and others in like condition, with the latter description of allies, given by Vattel, "where the lesser may be incorporated with the greater power, so as to form a *single state*, in which all the citizens will have equal privileges." And if it be found inexpedient to grant, to all, full citizenship at first, but only progressively, the principle is equally sustainable. The act of New York (1822.) as fully prostrated the Indian sovereignty, as

any more comprehensive legislation could have done ; and it appears to have been sustained by the Judiciary.

To shew the views of the British government, at a comparatively recent date, it may not be irrelevant to quote a section of an act of Parliament, in 1803. It is, "that from and after the passage of this act, all offences committed within any of the Indian territories, or parts of America, not within the limits of either of the said provinces of Upper or Lower Canada, or of any civil government of the United States, shall be, and shall be deemed to be, offences of the same nature, and shall be tried in the same manner, and subject to the same punishment, as if the same had been committed within the provinces of Upper or Lower Canada."

The act of Congress, "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," is also relied on for the prisoner, in opposition to the jurisdiction of the state.

Among other regulations, it provides that the Courts of each of the Federal Districts, in which any offender against this act shall be apprehended ; or, agreeably to the provisions thereof, shall be brought for trial, shall have full jurisdiction of all crimes and misdemeanors against the same.

One of the sections provides, that if any citizen shall go into any town, settlement, &c., of any tribe of Indians, and there commit murder on any Indian, of any tribe in amity with the United States, the offender shall suffer death.

The act "to provide for the punishment of crimes and offences, committed within the Indian boundaries," subjects offences committed in any Indian territory, which, if committed within the sole jurisdic-

tion of the United States, would be subject to conviction and punishment to like proceedings in the United States Courts—provided no Indian treaty be thereby infringed; and that such jurisdiction shall not extend to any offence committed by one Indian against another within any Indian boundary.

Consistently with the spirit of our Federal and State Governments, the acts of Congress, as well as various treaties referred to must have been mainly intended, as far as respects the exercise of judicial power over Indian territory, to establish the relation between the United States and Indian tribes, while the latter occupied lands embraced only by *territorial forms* of government; and which, from their recent organization, sparse population, and subjection to, and dependence on the general government, were incompetent to the efficient exercise of full sovereignty. Far different, according to the fundamental principles of the union, are the powers and privileges of the state governments. If, however, it be conceded, that the treaties and statutes referred to, were partially intended to apply also to tribes of Indians inhabiting the states, it could only have been, as already suggested, for a limited time, during the infancy of the states; or, while any particular tribe should remain so savage, fierce, or formidable, as to render it impracticable, or inexpedient, to subject them to state empire. Such, we find, is not the relative condition of this state and the Creeks.

The position, with others, has been assumed in argument, that the admission of Alabama into the union, with defined boundaries, cannot confer jurisdiction commensurate with these limits; because, it would be to confer greater powers on the grantee

than the grantor possessed. The tendency of this argument would be, to prove that the jurisdiction belongs to the Creek tribe. It would be an intolerable proposition, that a citizen of the United States, under the Constitution thereof, and of this state, should be subjected to the Creek mode and manner of trial and punishment. It is a power claimed, perhaps, by no tribe, but yielded to the United States by either the express or implied stipulations of various compacts or treaties, and which the latter have claimed, so far as such jurisdiction was deemed compatible with federal and state empire. The fact, that such power has never been claimed, or tolerated, in favor of any tribe, by any American treaty, furnishes a strong argument against the existence of Indian right of sovereignty, *in any respect*, after the earliest time when the state, inhabited by them, finds it expedient to extend its jurisdiction over them.

The 19th section of the intercourse law, seems to have contemplated the necessity of such a reservation of state authority—it provides, that the act “shall not be construed to prevent any *trade or intercourse* with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states.” Statutes are to be construed according to their reason and spirit, without a scrupulous regard to their literal expressions. The reason and necessity for the extension of the jurisdiction over the Creek country, in its present state, is substantially such as above contemplated. The Creek tribe, as also the Cherokees adjoining, “are surrounded by settlements of the citizens of the United States.” It cannot be required, that they should be

inhabitants of the same state; nor that the surrounded Indians should be of the same tribe—neither requisition could be made without the grossest absurdity. Surely, the Indian authority cannot derive strength, from the circumstance of their being located on a line, or lines, dividing two, three, or more states; nor from any given number of Indians being divided into two, or more distinct tribes. If such construction prevail, the consequence must be, that the very circumstances which render them more obnoxious and embarrassing to the citizens, by bringing their governments into conflict with those of several states, instead of one; or by leaving them a more impotent and degenerate community, from their division into distinct tribes, would have the effect to rivet them permanently on the state, or states. The Creek claim to distinct empire is, in principle, but the same that it would have been, had their territory been removed on the east, a few miles from the Georgia line, and on the north, as many from the Cherokees; and if the intermediate spaces had been occupied by freeholders, or intruders, citizens of the United States. The argument, that this provision can only apply to tribes that were, *at the passage of the law*, (1802) thus surrounded by citizens, would appear equally refined and preposterous. The law is general in relation to the Indians in the states, and territories of the union. The government was the only party to it. It is not in the nature of a compact, operating on the parties only, and to be varied by their mutual consent; but it stands as a law of the union, establishing rules uniform and universal, requiring a construction to suppress the evils and advance the remedy—to be applied to each tribe,



whenever its state and condition shall justify and require it. The law imports no designation of the individual tribes, or nations, to which it does, or does not apply, but merely defines the general principle of its application; the most important of which is, that it does not apply to prevent trade, or intercourse, with Indians living "within the ordinary jurisdiction of any of the individual states," *at the time when the question of sovereignty, or jurisdiction may arise.*

In all the British charters for American colonies, and in the articles of agreement and cession between the United States and Georgia, (though including Indian tribes,) are to be found express cessions of sovereignty to the grantees; on the contrary, it has never been deemed necessary, nor is there an instance of a cession from any Indian tribe, in which the right of sovereignty is expressed as a part of the rights ceded.

In determination of these vexed questions of conflicting empire, it may not be irrelevant to notice, briefly, how they stood under the confederation; and what changes have been since effected in the political relations of the parties.

It is declared, (*article 2,*) that "each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled."

(*Article 9.*) The United States in Congress assembled, shall have the sole and exclusive right and power of "regulating the trade and managing all the affairs with the Indians, *not members of any of the states: provided the legislative right of any state, within its own limits, be not infringed, or violated.*"

The Constitution subsequently adopted, contemplated the extension of jurisdiction over, at least, some of the tribes ; (as many, and at such times, according to reasonable inference, as the states might deem expedient ;) one evidence of it is, that Indians subjected to state taxation, are authorised to be included in the federal census.

Nor is there found in the Federal Constitution, more than in that of our state, any authority in the United States, to exercise the right of *sovereignty* over, or regulate *intercourse* with, the Indian tribes. The relative powers of the federal and state governments have been permanently established, by the sacred fundamental principles of the union ; so that they cannot be essentially varied, even by mutual consent, unless by an alteration of the Constitution, in the manner therein prescribed.

The relation is strongly demonstrated by the 3d section, 4th article of the Constitution, which provides, "that new states may be admitted by the Congress into the union ; but no new state shall be formed, or erected, within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress." It further declares, that "Congress shall have power to dispose of, and make all needful rules and regulations, respecting the territory, or other property, belonging to the United States ; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state."

5 Peters R.  
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The Supreme Court of the Union, in the case of the *Cherokee Nation vs. Georgia*,<sup>1</sup> appears to have left the relation of the Indian tribes to the United

States, in an awkward dilemma. The opinion delivered by *Marshall*, Chief Justice, raised the preliminary question, whether that Court had jurisdiction of the case. He remarks, "the 3d article of the Constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" between a state, or the citizens thereof, and foreign states, citizens, or subjects"—that a subsequent clause of the same, gives the Supreme Court original jurisdiction in all cases in which a state shall be a party. The party defendant may then unquestionably be such in this Court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the Constitution."

He continues, "their counsel have shewn conclusively, that they are not *a state of the union*, and insist that, individually, they are aliens, not owing allegiance to the United States." He also says, "the condition of the Indians in relation to the United States, is, perhaps, unlike that of any other two people in existence. In the general, nations not owing a common allegiance, are foreign to each other. The term, foreign nation, is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States, is marked by peculiar and cardinal distinctions, which exist nowhere else."

After advancing other views against their claim to the capacity of a foreign nation, the Court decides, that "they may more correctly, perhaps, be denominated *domestic dependent nations*"—that "they occupy a territory to which we assert a title independent

of their will, which must take effect in point of possession, when their right of possession ceases : meanwhile, they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian." Supposing such to be the true relation, whose right and privilege is it to terminate this wardship and pupillage? or by whom, and in what way, are they to be governed while it continues? The only way it ever has been, or can be, effectually done, is by the action of the state government, and that by the extension of its laws, as has been done by the statute in question. It was, as we have seen, an authority with which the state was invested, before the adoption of the Federal Constitution, and which has never been transferred, or relinquished. The contrary was not, on that occasion, maintained by the Supreme Court.

In as much then, as the Indian nations are not to be regarded, either as *foreign states*, or *states of the union*; but are unlike any other people in existence; their right to a separate existence, and that within regular constitutional states of the union, is found to be not more anomalous, than embarrassing to the states. Locally and politically, they are excluded from every portion of the world, except the United States. They can have no *alliances*, *confederation*, *intercourse*, or *commerce*, with any foreign nation. They have yielded these rights, by various compacts, or treaties, with our general, or state governments.

In "the Cherokee case" referred to, Chief Justice *Marshall*, in reference to these tribes, remarks, they and their country are considered, by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United

States, that any attempt to acquire their lands, or to form a political connection with them, would be considered, by all, as an invasion of our territory, and an act of hostility.

In the same case, *Johnson*, Justice, observes, "when this country was first appropriated, or conquered by the crown of Great Britain, they, (the tribes of Indians,) certainly were not known as members of the community of nations; and if they had been, *Great Britain, from that time, blotted them from among the race of sovereigns. From that time, Great Britain considered them as her subjects, whenever she chose to claim their allegiance; and their country as hers both in soil and sovereignty.* All the forbearance exercised towards them, was considered as voluntary; and as their trade was more valuable than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so." Further, he says, "they have in Europe *sovereign and demi-sovereign states, and states of doubtful sovereignty; but this (the Indian) state, if it be a state, is still a grade below them all; for not to be able to alien, without permission of the remainder man or lord, places them in a feudal dependence.*"

If it be suggested, that the United States government has recognized the Indian tribes as states, or nations, by holding various *treaties* with them, my reply is, that names may, or may not, be very material. If the government should enter into any legal agreement, or compact, with an individual, corporation, or voluntary association of persons, and should entitle it a *treaty*, instead of *agreement, compact, grant, or charter*, and no undue privileges were

claimed under it, by virtue of the name, no injury could result from the *misnomer*. So, with the Indian treaties—they must have effect according to their legitimate nature, regardless of their title; and if the opinion be correct, that the tribes are not such nations, or states, as were contemplated by the Constitution; not such as the United States are authorised to form "*treaties*" with, in the diplomatic sense of the term, (and which may become a part of the supreme law of the land,) the title with which they have been dignified, cannot give them that virtue, nor prove that the government could not, rightfully, make such compacts as they have done, to answer other purposes as therein expressed."

The validity of these treaties has seldom come in question, nor can it often; because they are, doubtless, binding on the Indians as parties; and, generally, binding on the United States, because authorised to dispose of the public lands, or at least extinguish the Indian title to it; and regulate commerce with the Indian tribes; and also, because the latitude of this treaty-making power, with Indian tribes, is so defined and circumscribed, by rights constitutionally established, that a violation of them would scarcely be attempted. This doctrine was recognized, and forcibly expressed by the American Commissioners, during the negotiations at Ghent. "The treaty of Greenville," say they, "neither took from the Indians the right which they had not, of selling lands within the jurisdiction of the United States, to foreign governments, or subjects; nor ceded to them the right of exercising exclusive jurisdiction within the boundary line assigned. It was merely declaratory of the public law, in relation to the parties, founded on

principles previously and universally recognized."

Relying on the foregoing review as establishing the positions, that the Indian tribes are not states, entitled to any constitutional right of empire, after the individual states embracing them, deem it expedient to incorporate them; and that the Creek tribe have no jurisdiction of crimes similar to the one in question; it only remains to be shewn, by further illustration, that the federal judiciary has not the jurisdiction, at least, exclusively of the state authority:

The Indians have an appropriate character and attitude assigned them by the Federal Constitution. It provides, (8 *sec.* 1 *art.*) that Congress shall have power "to regulate commerce with foreign nations, among the several states and *with the Indian tribes.*" Surely, the latter were intended to be distinguished from each of the former, or the different character or epithet would not have been used. As previously remarked, this right "to regulate commerce" is believed to have reference to tribes of Indians in a far different condition from those in question—nor can it be admitted, that this right to regulate commerce, can disparage the ordinary right of state sovereignty over the same country. The form and manner of the delegation of power, as well as the literal words, confers on Congress only the same power, which it may exercise with foreign nations, and among the several states. To this authority, thus interpreted, the state has not objected, nor does the jurisdiction in question conflict with this power. And this is the clause of the Constitution mainly relied upon by the prisoner's counsel, and all who oppose the state's right of sovereignty over the tribes.

It then becomes material to enquire what has been

the prevalent construction of the clause of the constitution, authorising Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?" Would it not be a strange *heresy* to maintain, that it confers authority, to exercise general municipal powers; or even to punish crimes and misdemeanors? If such be its effect, it can not fail to annihilate the sovereignty of every State in the Union; and also of Europe, could it be enforced.

That the clause in question has never been considered, in the State of New-York, to affect the ordinary rights of State sovereignty, is fully shewn by various decisions of their highest tribunals—*Livingston vs. Van Ingen*,—*Gibbons vs. Ogden*. In the last case an appeal having been taken to the Supreme Court of the United States, that Court holding the powers of the State less, and those of Congress more extensive than they had been adjudged by the Court of Errors in New-York, reversed the decree of the latter; but in doing so, recognised a construction of this clause of the Constitution totally inconsistent with the *magic* influence which has been recently ascribed to it. The decision by *Marshall*, Chief-Justice, remarks, that though the inspection laws might have a remote and considerable influence on commerce, the power to pass them did not arise from the authority to regulate *commerce*. He adds, "they act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces every thing within the territory of a State, not surrendered to the general government: all which can

\*9 Johns R  
507.

\*17 Ib. 488.



be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass. No direct general power over these subjects is granted to Congress; and consequently they remain subject to state legislation."<sup>3</sup> Wheat. 203.

I, therefore, arrive at the conclusion, that the power of the state to extend its jurisdiction over the Creek territory, (claiming no right to dispose of the soil, or dispossess the occupants,) cannot be successfully resisted on the authority of the clause of the Constitution relating to commerce—of the intercourse law of 1802, or any other acts of Congress in relation to the same.

The prosecuting counsel refers to clauses in the Federal Constitution, and to the act of Congress, in pursuance thereof, which, he contends, negative the idea of jurisdiction in the United States Courts.—These clauses are, (*art. 1, sec. 8.*) that Congress shall have power to exercise exclusive legislation "over all places, purchased by the consent of the legislature of the state in which the same shall be erected, for *forts, magazines, arsenals, dock yards, and other needful buildings,*" and to pass all laws necessary to the execution of the power. The act of Congress, as will presently be seen, is rather more comprehensive in its terms. But the exposition of them by the Supreme Court, at Washington,—*United States vs. Bevens*—denies their application to Indian territory.<sup>3</sup> Wheat. 336. Without stopping to examine the merits of the case, which are unimportant to our purpose, it is sufficient to say, it involved the construction of the

clauses of the Constitution referred to, and of the 3d section of the act of Congress, passed under the authority of the same, in 1790, entitled "an act for the punishment of certain crimes against the United States," the language of which is, "that if any person shall, within any fort, arsenal, dock-yard, magazine, or any other *place*, or *district of country*, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful *murder*," such person shall suffer death. *Marshall*, Chief Justice, in delivering the opinion of the Court, declared, that "the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative powers;" and in reference to the construction of the section of the act recited, says, "when the sentence proceeds with the words, 'or in any other place or district of country, under the sole and exclusive jurisdiction of the United States,' the construction seems irresistible, that by the words, *other place*, was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some *similar place* within its exclusive jurisdiction, which was not comprehended in any of the terms employed, to which some other name might be given; and, therefore, the words *other place, or district of country*, were added; but the context shews the mind of the legislature to have been fixed on territorial objects of a *similar character*."

Nothing more is deemed necessary, to shew the total inapplicability of that authority to a crime committed on *Indian territory*, for which the United States have no special reservation, for purposes similar to those enumerated; that such places are not

embraced by implication; nor have the prisoner's counsel relied on this authority.

The circumstance of the United States having the ultimate right of soil, cannot impair the right of sovereignty. There is no incongruity in the proposition, that the right to the public domain resides in the United States, while the ordinary right of empire, over the same territory, is vested in the state government. Such is, and has been; the condition of most or all the new states. While the United States have possessed and exercised the right to dispose of the unappropriated lands, and even to remove intruders from them, the states, containing them, have, as uniformly, exercised the ordinary municipal government.

*Vattel's* doctrine, relative to *domain*, cannot fully apply to the peculiar rights and relations of our governments; but so far as it can apply, it sustains these positions. He says, "the *useful domain*, or the domain confined to the rights that may belong to an individual in the state, may be separated from the *sovereignty*; and *nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction*. Thus, many sovereigns have fiefs, and other possessions, in the territories of another prince; in these cases, they possess them in the manner of private individuals." The *eminent domain*, he defines to be, "the right, which belongs to the society, or to the sovereign, of disposing, in cases of necessity, and for public safety, of all the wealth contained in the state."

<sup>B.2. ch.7,  
sec 87.</sup>

The right to the waste, or unappropriated lands, within this state, (which must include the lands occupied by the Indians, if not before, after the extin-

guishment of their title,) however it might otherwise have been, was reserved to the United States, by agreement between the two governments, at the time of the admission of the state to self-government. The consequence of this state of things, according to my doctrine, is, that while the United States hold the *seisin*, or *ultimate fee*, and have guaranteed to the Indians the *usufructuary interest* in the soil they occupy, the state government, [without any claim to the soil,] possesses the same right of sovereignty, to the extent of our chartered limits, that is common to other states of the union, under the Constitution thereof. At the same time, the United States can rightfully exercise that degree of federal sovereignty and jurisdiction, which belongs to them, in, and over other states of the union.

The result of this investigation is, that the tribe in question cannot be regarded either as a *foreign nation*, or *state of the union*; that, if from want of rank in the community of nations, or states, they must be considered (as denominated by the Supreme Court of the United States,) "a domestic dependent nation," in a state of "pupilage," and unlike any other recognized by any nation; their wardship has general relation, as their guardian, to the state whose limits they inhabit; with the exception of the rights necessarily incident to the ultimate right of domain remaining in the United States, and the power in Congress to regulate commerce with the Indian tribe, as it may do with foreign nations, and, elsewhere, among the several states; that this guardianship over the tribe was vested in the local government, (if not before,) by the admission of the territory to the powers and privileges of state government; and that

the proper time and manner of exercising the trust, (and of course, abolishing the Indian laws and customs,) are, and have been, questions of grave duty, resting in the discretion of the legislature. I consequently maintain, that the statute in question is constitutional and valid, and the conviction of the prisoner legal; and that the judgment must be affirmed.

TAYLOR, J.—This case involves the question of the validity of the statute, passed by the general assembly of this state, in 1829, entitled, “an act to extend the jurisdiction of the state of Alabama over the Creek nation.”

That act extends the limits of the counties lying contiguous to the country occupied by the Creek Indians, over adjoining parts of that country, and gives plenary jurisdiction, both civil and criminal, to the Courts of the several counties, over the territory thus added to them.

Under the provisions of this act, Caldwell was indicted in the county of Shelby for the murder of an Indian, which, on the trial, was proved to have been perpetrated within the Creek country, and within the bounds of that county, as defined by the statute.

Caldwell has been tried and convicted, but the question of jurisdiction, which brings into consideration the constitutionality of the statute under which the conviction has taken place, was reserved as novel and difficult, by the Judge of the Circuit Court, for the decision of this Court.

I deem it unnecessary to transcribe any part of the statute; it is enough to say, that its provisions are fully adequate to effect the object intended by it,

Nor shall we fail to derive aid in this investigation by an examination of writers on the law of nations. So far from being overlooked, the condition of the Indians of North America, and their rights, as well as the peculiar rights and privileges of the European states, whose subjects first discovered this continent, are largely discussed by these writers.

*Vattel* (page 92) lays down the following doctrine : "The cultivation of the soil is not only to be recommended by the government, on account of the extraordinary advantages that flow from it ; but from its being an obligation imposed by nature upon mankind. The whole earth is appointed for the nourishment of its inhabitants : but it would be incapable of doing it, was it uncultivated. Every nation is then obliged, by the law of nature, to cultivate the ground that has fallen to its share ; and it has no right to expect or require assistance from others, any farther than as the land in its possession is incapable of furnishing it with necessaries. Those people, like the ancient Germans, and the modern Tartars, who, having fertile countries, disdain to cultivate the earth, and choose rather to live by rapine, are wanting to themselves, and deserve to be exterminated as savage and pernicious beasts. There are others, who, to avoid agriculture, would live only by hunting and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its few inhabitants. But at present, when the human race is so great multiplied, it could not subsist if all nations resolved to live in that manner. Those who still retain this idle life, usurp more territories than they would have occasion for, were they to use honest

labor, and have therefore no reason to complain, if other nations, more laborious and too closely confined, come to possess a part. Thus, though the conquest of uncivilized Peru and Mexico was a notorious usurpation, *the establishment of many colonies on the continent of North America may, on their confining themselves within just bounds, be extensively lawful.* The people of these vast countries rather overran than inhabited them."

Again, the same writer uses the following language: (page 153-4)—"There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked if a nation may lawfully take possession of a part of a vast country, in which there are found none but erratic nations, incapable, by the smallness of their numbers, to people the whole? We have already observed, in establishing the obligation to cultivate the earth; that these nations cannot exclusively appropriate to themselves more land than they have occasion for, and which they are unable to settle and cultivate. Their removing their habitations through these immense regions, cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they make no actual and constant use, may lawfully possess it, and establish colonies there. We have already said that the earth belongs to the human race in general, and was designed to furnish it with subsistence: if each nation had resolved, from the beginning, to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth

part of its present inhabitants. People then have not deviated from the views of nature, in confining the Indians within narrow limits. However; we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land they resolved to cultivate."

Again (page 228)—"No nation can appropriate to itself a too disproportioned extensive country."

These doctrines are maintained by Martens, Montesquieu, and every respectable writer who has treated on the same subject.

It thus appears that the human family is divided, by these writers, into two classes. 1st. Agriculturists, or those who use the earth in that way which is calculated to secure the subsistence and happiness of the greatest number of inhabitants, and whose possessions, therefore, cannot be rightfully invaded; and, 2nd, Those who are erratic in their habits, who do not use the soil over which they roam, but live either by rapine and violence, or depend upon the precarious supplies afforded by hunting, fishing, and wild fruits. The country which the latter "over-run rather than inhabit," may be lawfully occupied by those of other nations who intend to appropriate it to agricultural purposes, if they "confine themselves to just bounds:" that is, as I understand it, leave an ample territory to these nomadic tribes to subsist upon by becoming cultivators of the soil, and to furnish them with necessary supplies by their usual pursuits, until they can effect the necessary change in their mode of life.

If this is not the view which is taken of these



wandering tribes and hordes, why the compliment which is paid by Vattel to the English puritans who first settled New England. If he did not consider their charters as vesting them with ample authority to possess themselves of so much of the Indian lands within their limits as they chose or were able to do, without making any compensation to the aboriginal occupants, why praise those early settlers, because "notwithstanding their being furnished with a charter from the sovereign, they purchased of the Indians the land they resolved to cultivate?" But more especially, if this sovereign himself had no legal right to touch a foot of those lands, except such as he acquired by treaty, by what mode of reasoning could the author come to the conclusion, that the puritans had exhibited a moderation and forbearance towards the inhabitants of the forest, which demanded the tribute of his praise?

It is obvious that this writer believed, that the European discover of a country possessed by wandering tribes of Indians, had a right to appropriate to himself so much of their territory as he required, to be used for the purpose of tillage, and that he considered the charters which were granted to our ancestors, by the King of Great Britain, as conveying this right.

To sustain the constitutionality of our statute, it is not necessary to show a right in the sovereign of civilized nation, discovering a country inhabited by wandering savages, to appropriate any part of their soil to the use of his subjects: for the statute does not authorise the possession of a solitary Indian to be disturbed: but to avoid the possibility of coming to an erroneous conclusion to the injury of the In-

dians, and to have every proper analogy before me to assist in forming an opinion upon the subject of jurisdiction, I have thought it right to bring to my aid the doctrines which have obtained in the civilized world, with respect to the right of soil in Indian lands.

To avoid every probability of error on this subject, I will now enter into an examination of the views of some of the European sovereigns, whose subjects first discovered, and who established colonies in different parts of this continent; and of our ancestors, the first emigrants from Europe, to the country now included within the limits of the United States: with regard to the power which they possessed.

It would be a waste of time to produce proof that that the territory within those discoveries, was considered by all the civilized world as annexed to, and forming a part of the dominions of the state whose subjects made the discovery. This has not, in the argument of this case, nor, I believe, upon any other occasion, been controverted. It has uniformly been considered as much an aggression for another nation to intrude upon its domain, as upon any other of its possessions. Nor had any other state a right to carry on any intercourse with the inhabitants of the discovered country without the consent of the sovereign who held by discovery, although ninety-nine out of every hundred of those inhabitants might have been Indians, and probably were. It is true, unless some indication of an intention to occupy the country was given by the discoverer, it was open to the first power which did occupy it, and in such case the lat-

ter power possessed all the rights and privileges of dominion.

Notwithstanding frequent wars took place between European nations on account of their American possessions, many of which originated in disputes about boundaries, yet the principle here laid down was never contested. For information on this subject, the inquirer may successfully resort to the able opinion of Chief Justice Marshall, delivered in the case of *Johnson vs. McIntosh*.<sup>18 Wheat. 571.</sup>

It is useless, for practical purposes, now to inquire, by what authority these discoverers obtained for their government such extensive rights over this immense continent, and the numerous nations who inhabited it? Or whether nature has given this power to agriculturists, over hunters or fishermen? The power has been in constant exercise for centuries, and it is not for courts of justice to found their decisions upon abstract speculations, but upon law, and precedent having the force of law.

The acts of the sovereigns of Europe, from the first discovery of America, show that they maintained their rights in those parts of it which were discovered by their subjects respectively, to be as ample and their jurisdiction as complete, as property in the soil, and dominion over the country could make them.

The charter granted by the King of Spain to Columbus, is expressed as follows: "In order that in the said islands and mainland, which are discovered and shall be discovered hereafter in said ocean, in the parts mentioned of the Indies, the inhabitants of all that country may be better governed, we give you such power, and *civil and criminal jurisdiction*," &c.

This *jurisdiction*, it will be recollected, was for the "better government of the inhabitants," when the only "inhabitants" were natives.

Queen Elizabeth's charter to Sir Humphrey Gilbert, authorised him, "at all times hereafter to discover, find, search out, and view such remote heathen and barbarous lands, countries, and territories, not actually possessed of any christian prince or people, as to him, his heirs and assigns, shall seem good, and the same to have, hold, occupy and enjoy, to him, his heirs, and assigns forever; with all commodities, *jurisdictions*, and royalties, by sea and land! And further, shall have, hold, and occupy all the *soil* of all such, &c., and of all cities, castles, towns, and villages in the same, with the rights, royalties, and *jurisdictions*," &c.

The one to Sir Walter Raleigh, grants "all the soil of all such lands, territories, and countries, to be discovered and possessed as aforesaid, and of all such cities, castles, towns, villages, and places in the same with the royalties, franchises, and *jurisdictions*," &c.

All the charters granted by the Kings of England, were equally ample. That to Massachusetts, gives authority "to take and to hold that part of New-England, &c. and all the islands, rivers, ports, havens, waters, fisheries, mines, minerals, *jurisdictions*," &c.

It thus appears that the different potentates of Europe, so far from regarding the Indian tribes as sovereign nations, whose jurisdiction within their dominions was sacred, paid no respect to their internal regulations, or even their right to the soil, but proceeded to distribute the land and to exercise their own jurisdiction, as they would have done had the Indians not existed.

The charter to Connecticut gives a general power to make war on, "and upon just causes to invade and destroy the *natives* or other enemies of the said colony." It must be borne in mind that this charter was granted before the settlement of Connecticut, and in contemplation of that event. I would ask, what is meant by the words "just causes." Had this chartered company any right, according to the opinion of those who deny the power of the State to pass the law in question, to set a foot on the lands of the sovereign nations who resided within the limits of the Connecticut grant, and who are therein denominated "the natives?" Suppose these "natives" had refused to sell an acre of their domains to the emigrants, but permitted them to land upon their coast, and they had proceeded to erect houses to dwell in, and open plantations for cultivation, without any express permission from their landlords, and these landlords had then requested them to leave their shores, declaring that they could not consent to receive them as inmates of their country, nor permit them to possess lands within their limits; what would have been the conduct of these "moderate puritans?" Would they have felt that they were aliens in a foreign empire, and bound to comply with the requisitions of the ruling powers? Or would they have treated the demand for their departure with contempt, and viewed any attempt to enforce it as "just cause for war?" In a word, would they not have considered themselves landlords and not tenants, and an attempt to dispossess them of the fruits of their industry and toil, as ample cause, not for war, (the charter does not use this term of equality when speaking of the resident Indians,) but "to

invade and destroy the natives?" And yet surely the kindness of the Indians, in extending hospitality to them in the first instance, instead of at once expelling them from their shores, could give no title to the territory which they occupied. It is a general regulation in civilized communities, that aliens shall not hold a fee simple title to land, and what is to prevent the sovereigns of the wilderness from adopting and enforcing the same policy? It appears to me absurd, that any sovereign should grant a large extent of country to a company and vest in them the fee in the soil, and extensive political privileges, uniformly including jurisdiction, over the natives of the country in express terms, when he believed that he had himself no right to exercise jurisdiction over the country nor ownership over the soil, and that both resided in distinct independent nations then inhabiting the granted territory. I know it is said, that these grants conveyed the ultimate fee, that they contemplated a purchase of the possession from the Indians, who were viewed as the rightful occupants, and who could not be dispossessed without their consent. But the whole history of the western world, contradicts this assertion. The Spaniards, the Dutch, the French, the English, all took possession of great part of the countries they discovered without regard to any title in the first inhabitants, and extended their settlements and territories as their wants required. The charters obtained by the early settlers, expressly granted the right of soil and jurisdiction, and meant what they said. A great part of Virginia, and of the other Southern States, and of Kentucky and Tennessee were taken possession of, not because the Indians agreed that it should be done, but because the whites

willed to do it. It is true, that most of the country, particularly in the two latter states, was ceded by treaties, but the cessions were generally made by treaties of peace at the termination of hostilities between the white and red man, which had been produced by the occupation of the lands of the latter by the former, and often relinquished a claim to that, great part of which had before been wrested from their possession. The authority "to invade and destroy the natives," conferred by the kings of England upon the colonists, carries irresistible proof to my mind; that the grantor considered himself lord and rightful sovereign of these domains. The power conferred was not to declare war, but "to invade and destroy," manifesting that no declaration of war was necessary, no conformity to the usages existing among civilized nations intended, no boundaries to be regarded, but the pursuit to be continued wherever the foe could be found, until this savage enemy was "destroyed." Would it not be a most extraordinary departure from all civilized usage, for one nation to authorise a part of its subjects "for just causes," of course to be determined on by them, "to invade and destroy," the citizens or subjects of a neighboring state, and would not such an act be justly viewed as hostile in its character?

The fact that by far the greater portion of the territory within the United States which has been obtained from the Indians, has been procured by purchase, can not weigh greatly in this investigation, when it is recollected, that the consideration paid for it, was always, until recently, merely nominal, and that true policy required that these fierce nations, which generally surrounded the settlements of the

whites on every side, except the one washed by the ocean, should be conciliated. Nor is the circumstance that they were, in early days, usually left under the government of their own peculiar customs, any argument against the right of the colonizing nations to exercise jurisdiction over them. No beneficial effect could have resulted from an effort of this kind, and its only tendency would have been to have aroused the jealousy of the Indians, and excited their combined efforts against their new neighbors, when thus informed that the whole country was considered as subject to their sway.

Additional light may be obtained on this subject of Indian privileges, by reference to a speech of Mr. Stuart, superintendent of Indian affairs, made to the Indians at Mobile, soon after the conclusion of peace in 1763. The following is an extract from that speech : " Lastly, I inform you that it is the King's order to all his governors and subjects, to treat the Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them ; accordingly all individuals are prohibited from purchasing any of your lands. But as you know that your white brethren can not feed you when you visit them, unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting grounds will be accurately fixed, and no settlement be permitted to be made upon them. As



you may be assured that all treaties with you will be faithfully kept, so it is expected, that you also, will be careful strictly to observe them."

Here the Indian "hunting grounds" are spoken of as being "allotted" to them by the King; a strange phraseology, if the King's lands were, in fact, to be allotted to him by the Indians. And so careful was this superintendent, lest he should compromise the rights of his master, that he used the expression "Indian hunting grounds," not "Indian lands." Is it not evident that he considered the Indians as occupying these lands for the purpose of hunting, by the permission, and at the discretion of the King. He has "allotted" them, laid off the boundaries, and although he will not permit his subjects to encroach on these "hunting grounds," and expects "the consent of all your people" when you agree to contract your limits, yet as your white brethren "will want ground to plant," it is expected that you cede "lands to the King for that purpose." The amount of all which, seems to be this.—The King has in kindness still permitted you to occupy these lands as hunting grounds. He is perfectly satisfied, that at the request of the governors of his provinces, or his superintendent, you will, for the merest trifle, agree to contract the limits of the country thus "allotted" to you, whenever his subjects may require more land for the extension of their settlements, and he is willing to give you this trifle, because it is much better to have your friendship on these terms, than to have your lands for nothing, but your enmity as the consequence. It may be said, that the Indians can not be presumed to have understood the peculiar meaning of the word "allotted," and, therefore, could

not have yielded any right or privilege by not objecting to the use of it. The inquiry, however, is not, how did the Indians understand this language, but how was it understood by the sovereign whose agent employed it? It has never been supposed that the wild savage tribes who inhabited this continent in the sixteenth and seventeenth centuries, considered their lands as the property, or themselves as the subjects of the different European powers who claimed them as such, nor did they doubt their right to treat and trade with whom they pleased; especially those who roamed at a distance from the white settlements. They had as little idea of the restraints which they are admitted to have been subject to, as any others. Can it be believed that the Cherokees of that day believed that the fee of their lands was vested in the King of Great Britain, subject only to their occupancy, and that he could make a valid grant of that fee even to the spot in the centre of the nation upon which they met to hold their counsels, to a citizen of London?

It is not our business to ascertain the opinions of the Indians as to the relative situation which they occupied to the European governments which planted colonies among them; but the understanding of the civilized world is what we wish to know.

The proclamation issued by the King of Great Britain in 1763, soon after the ratification of the articles of peace, contains the following sentence. "And we do further declare it to be our royal will and pleasure, *for the present*, to reserve under our sovereignty, protection, and *dominion*, for the use of the said Indians, all the lands and territories, lying to the westward of the sources of the rivers which

fall into the sea, from the west and north west as aforesaid."

There is contained in these words the plain reservation of a right to determine the Indians "use" at pleasure. But be this as it may, there is a manifest declaration of sovereignty and *jurisdiction*. To be within the "dominion" is synonymous to being within the *government* or *jurisdiction* of the author of the proclamation.

I think I have shewn that the European monarchs who held colonies in the western world, considered themselves as having the right of the soil, but more especially of jurisdiction throughout their western dominions; and that they did not take actual possession of the lands and bring the Indians within the direct control of their civil tribunals, resulted alone from what was considered the dictate of true policy.

I come now, in the course which I have laid down for my government in this investigation, to an examination of the acts of some of the British colonial legislatures relative to the Indians, passed before the revolution. And I propose to embrace in this examination some of the statutes providing for the punishment of individual Indians for offences committed in the country occupied by the whites, with the view of ascertaining whether they were considered to be clothed with all the privileges of citizens or subjects of a foreign government, or were viewed as inferior beings, who from their savage nature, required a different measure of punishment from that which was meted to British subjects for similar offences. For if this be so, it will go far to prove in what light the colonists estimated Indian titles and Indian jurisdiction.

So early as the years 1660 and 1672, we find the colony of Massachusetts legislating on this subject. One of their first acts was "for settling the Indian title to lands in this jurisdiction." By this law it was provided, "That what lands any of the Indians in this jurisdiction have possessed and improved, by subduing the same, they have just right unto:

"And for the further encouragement of the hopeful work among them, for the civilizing and helping them forward to christianity, if any of the Indians shall be brought to civility and shall come among the English to inhabit in any of their plantations, and shall there live civilly and orderly, such Indians shall have allotments amongst the English, according to the custom of the English in like cases.

"No person shall sell, give, or barter, directly, or indirectly, any gun or guns, powder, bullets, shot or lead, to any Indian whatsoever, or to any person inhabiting out of this jurisdiction, nor shall any amend or repair any gun belonging to any Indian, nor shall sell any armour or weapons, upon penalty of ten pounds for every gun, &c."

"In subsequent acts the following provisions are contained: Whereas the French and Dutch and other foreign nations, do ordinarily trade guns, powder, and shot, with Indians, to our great prejudice, and strengthening and animating the Indians against us, and the aforesaid French, Dutch, &c. do prohibit all trade with the Indians within their respective jurisdictions, &c.

"It is therefore ordered: That it shall not be lawful for any Frenchman or Dutchman, or any person of any other foreign nation whatsoever, or any English, dwelling amongst them, to trade with any Indian

or Indians within the limits of our jurisdiction, under penalty of confiscation of all such goods and vessels as shall be found so trading, &c."

"And it shall be lawful for any person inhabiting within this jurisdiction, to make seizure of any such goods or vessel so trading with the Indians."

From these statutes it appears that Indians were prohibited from engaging in particular kinds of trade with any and every person whatever; that it was considered unsafe to permit them to have arms, and that a citizen was liable to a considerable penalty for furnishing them with even a pound of shot. But the one last extracted from, proves more than this. It shows that the trade of foreigners with the Indians, throughout the whole limits of the colony, was either regulated or interdicted as was deemed proper. For it cannot be supposed that the intention of the statute, was only to prohibit this trade in arms and ammunition within the settlements of the colony. It would have been folly to have supposed that foreigners would thus openly attempt to excite the hostility of the Indians towards the colonists. We, therefore, also learn from these extracts, that the term "jurisdiction," when used by the legislature of Massachusetts to express the extent of country over which it was exercised by the colony, included their whole chartered limits.

In the winter of 1693-4 an act was passed in the same colony, "for the better rule and government of the Indians in their several plantations." The object of the statute is declared to be, "That the Indians may be forwarded in civility and christianity, and that drunkenness and other vices may be more effectually suppressed among them."

By this law it is provided, "That his excellency the governor, by and with the advice and consent of the council, may, and is hereby empowered to appoint and commissionate one or more discreet persons within the several parts of this province, to have the inspection and more particular care and government of the Indians in their respective plantations; and to have, use, and exercise the power of a justice of the peace over them in all matters, civil and criminal, as well for the hearing and determining of pleas betwixt party and party, and to award execution thereon, as for the examining, hearing, and punishing of criminal offences, according to the acts and laws of the province; &c.

"It shall and may be lawful for any person or persons to seize any wines, strong liquors, or cider, which he or they may find in the custody of any Indian, &c.

"Every Indian convicted of drunkenness, shall suffer and pay, unto the use of the poor of the town or place where such offence is committed, the sum of five shillings, or else be openly whipped by the constable of such town or place, not exceeding ten lashes."

This statute at least proves that the Indians were measured by a rule different from that which was applied to the rest of the population. The most degrading punishment is to be inflicted upon one of them for the slightest misdemeanor: public whipping for intoxication; which offence when committed by a white man was followed by a very different punishment. What would have been thought of a law which made such a distinction between the provincials, and the subjects of the King of France

or of Spain? It would not have been tolerated. And yet it is urged that never until this day have the Indians been received as other than sovereign nations, collectively and individually possessing all the rights and privileges which appertain to the citizens of such nations, and entitled in other countries than their own, to all the comity and respect which would be extended to the subjects of the proudest potentate of Europe. We see, however, that the "moderate puritans" of Massachusetts Bay, viewed them as savages and outlaws, who, while they wished to civilize and reclaim them, were to be punished in the most ignominious manner for the slightest offences and to be restrained from crime, like the slave, not by incitements to good, but by the terror of the suspended whip. It cannot be believed that a people thus singled out for infamous punishment, thus subject to have the spirits, the wines, &c., which they had purchased, and of course any other articles which the legislature might have chosen to add to the catalogue, arrested from them by every petty constable; were considered as possessing all the privileges of citizens of sovereign independent communities. They were found roving bands of savages by our ancestors, who first settled the American wilderness, governed entirely by their passions, and giving a full sweep to every appetite without regard to consequences. They could not be induced to forbearance from those gratifications of the animal appetite, so destructive in their consequences, by the incentives usually addressed to the civilized man. They were treated as a peculiar people, distinct laws were enacted to govern and control them, they were addressed through their fears, and while every induce-

ment was held out to them to change their mode of life, to give up their habits of indolence and dependence upon the chase, and to apply themselves to agriculture and the arts; the slightest offences brought upon them the degrading punishment of the lash; most degrading when inflicted upon the white man, and never prescribed except for the most heinous crime: but the Indian neither felt nor feared the disgrace, the bodily pain alone was the object of terror to him.

We have evidence amounting to demonstration of the opinion entertained by the legislature of the province of Massachusetts Bay, of the situation which the Indian tribes within the limits of their charter occupied, in relation to the government of Great Britain, in the preamble to a statute passed in 1725. It is in the following language: "Whereas the Indians in the eastern part of the province, having been some years past in hostilities and *rebellion*, have now submitted themselves, and recognized their subjection and obedience to the crown of Great Britain," &c. They are stated to have been in "rebellion." Who are rebels? Those who, owing obedience, take up arms against a government. Can the members of an independent nation be guilty of "rebellion," by engaging in "hostilities" with another independent nation? I presume this will not be contended. Among all the sovereign states treated of by the writers on national law, not one of the stronger or weaker, the protector or protected, whether united by alliance, league, or confederacy, is declared to be guilty of *rebellion* by taking up arms against the other. Rebellion implies allegiance, and if there has been no allegiance, there can be no rebellion. Yet here the



tribes who had never been brought into actual subjection, as is obvious from the phraseology, who had not hitherto received the justices of the peace and constables which the governor, under the paternal provisions of the laws, was authorised to appoint; who had never submitted themselves to the fatherly chastisement of the whip for getting drunk, who, as to any actual restraint, have been as free as their own native wilds, are declared to have been *rebels*. If rebels, they had surely been guilty of treason; and as traitors, might have been tried, condemned, and executed upon their submission, but for the mercy of *their* sovereign against whom they had offended.

The statutes of Connecticut keep pace with, and are, in almost all respects, similar to those of Massachusetts. The laws of that province also, restrained the intercourse and trade between the Indians and whites; prohibited the latter from selling or giving to the former spirituous liquors, &c., prescribed the punishment of whipping to be inflicted upon an Indian for drunkenness, and declared the great objects in view to be the christianizing and civilizing the sons of the forest, and to induce them to give up the chase and turn their attention to agriculture.

The other colonies of New England exercised similar powers, but it is deemed unnecessary to make special reference to any of the statutes.

I might multiply quotations similar to those which I have made from the laws of Massachusetts, from the statutes of every colony which afterwards formed the thirteen United States, but I will content myself with a reference to some of the acts passed in Virginia.

In the year 1658, the legislature of that province

enacted, "That there be no grants of land to any Englishman whatsoever (*de futuro*) until the Indians be first served with the proportion of fifty acres of land for each bowman; and the proportion of each particular town to lie together, and to be surveyed as well woodland as cleared ground; and to be laid out before patented, with liberty of all waste and unfenced lands for hunting for the Indians."

Again—"Whereas many complaints have been brought to this assembly, touching wrong done to the Indians, in taking away their land, and forcing them into such narrow straits and places, that they cannot subsist either by planting or hunting, &c.—Be it enacted, that all the Indians of this colony shall and may hold and keep those seats of land which they now have; and that no person or persons whatsoever, be suffered to intrench or plant upon such places as the said Indians claim or desire, until full leave from the governor and council."

Here full power is recognised in the governor and council to deprive the Indians of the places they occupied, nor is the land restored which it is acknowledged had been taken from them.

In 1660, the following law was passed in the same colony :—"Whereas, the Indians of the Accomack have complained that they are very much straitened for the want of land, and that the English seat so near them, that they receive very much damage in their corn. It is ordered that the right honorable the governor give commission to two or three gentlemen, with a surveyor living on this side of the bay (that have no relation to Accomack) to go over thither, and lay out such a portion of lands for the said Indians as shall be sufficient for maintenance, with hunting and fishing excluded; and the land so laid

out, to be so secured to the Indians, that they may have no power to alienate it, or any part of it, hereafter, to the English."

In 1665, the same colony enacted, that, "Whereas, at a Grand Assembly, held at James City, September 10, 1663, it was provided that where any murder was committed by the Indians upon the English, the next turn of the Indians was to use their utmost endeavors for discovering the actors and doers thereof, and in regard the same act was only limited to the northern Indians," this proceeds to make the provision general. Another section is as follows: "That the said Indians shall not have power within themselves to elect or constitute their own Werowance or chief commander, but the present honorable governor and his successors from time to time, shall constitute and authorise such persons in whose fidelity they may find the greatest cause to repose a confidence, to be the commander of the respective towns: and in case the Indians shall refuse their obedience to, or murder such persons, then that nation so refusing or offending, be accounted enemies and rebels, and to be proceeded against accordingly."

Here is evidently an innovation upon the internal regulations of the Indians, and, in fact, an abrogation of their civil institutions and customs. These must have prevailed before, and their "Werowance or commanding chief," have been constituted by their own appointment; else why the apprehension that those appointed under this statute will not be received by them?

I think enough has been said on this part of the subject to satisfy an impartial mind that neither the sovereigns of Europe who held possessions in Ameri-

ca, nor the colonial legislatures, doubted their right to embrace within the jurisdiction of their courts, any Indian tribes who were situated as to make it expedient to do so. Doubtless at the date of many of the statutes which were passed in the colonies for the government and regulation of the Indians, some of the nations had been so much reduced in limits and numbers as to bring their whole country within the immediate neighborhood of the whites, and to render it perfectly convenient, and every way desirable, to embrace them directly within the operation of the laws. In Virginia, it would appear, that the territories of many of the tribes were gradually intruded upon by the colonists until the Indians had not land enough left to answer their own demands for the purposes of agriculture, hunting, &c., and the legislature was compelled frequently to interfere to prevent their entire expulsion from the home of their fathers. For it cannot be supposed that regular cessions had been made of all the country which these Indians inhabited, who were the objects of the care of the legislature; if so, they, as do the red men of modern times, would have left the country they had parted from by treaty, and sought other places of habitation. But this was not their situation. The increasing numbers and advancing improvements of the colonists required the extension of their borders, and they pressed into the Indian countries around them as their wants required; thus we find the European and the aboriginal American inhabitants of the same country, and the possessions of the latter diminishing while those of the former are enlarging.

I will now give a cursory examination to some of the judicial decisions of different courts within the

United States, so far as they bear upon this question.

In the celebrated case of *Fletcher vs. Peck*,<sup>86</sup> before Cranch<sup>87</sup> the Supreme Court of the United States, the learned Counsels for the defendants used the following argument, in which, so far as the opinion embraces it, they were sustained by the court.

“The right of disposing of the lands belonging to the state, naturally devolved upon the legislative body, who were to enact such laws as would authorise the sale and conveyance of them.

“A doubt has been suggested whether this power extends to lands to which the Indian title has not been extinguished. What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them rather than inhabited. It is not a true and legal possession. It is a right not to be *transferred*, but *extinguished*. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right. Georgia had a right to sell, subject to the Indian claim.

“Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil, but a right of occupation. A right, not individual, but national. This is the right gained by conquest. *The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives.* Even Penn claimed under the right of conquest. He took under a charter from the King of England, whose right was the right of conquest. All the trea-

ties with the Indians were the effects of conquest. All the extensive grants have been forced from them by successful war. The conquerors permitted the conquered tribes to occupy part of the conquered land until it should be wanted for the use of the conquerors. Hence the acts of legislation fixing the lines and bounds of the Indian claims; hence the prohibition of Indian purchases," &c.

Chief Justice Marshal, in the opinion delivered in that case, said, "the majority of the court (Judge Johnson dissented) is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to *seisin* in fee on the part of the state."

By "the right of conquest," nothing more is in fact meant than the right of discovery. It was "the right of discovery" as to the civilized world, "the right of conquest" as to the Indians themselves. True, but a small part of the country had actually been conquered; many of the wandering tribes, who lived at a great distance from the sea-board, had scarcely heard that a new race had landed from the ocean; the thunders of European artillery had never reached their ears; and utterly astonished would they have been, to have learned that Kings and States General beyond the Atlantic, claimed the sovereignty over them and their lands, and made this claim as their conquerors. Yet doubtless this claim was made, because the nations asserting it intended making it true, if their pretensions were opposed by resistance. If the Indians had opposed the landing of the Europeans on their shores, and rejected all their propositions for a peaceful surrender of their lands, there

would have been conquest in fact instead of in name only, and such, some of the tribes, who refused to cede by treaty, found to be their fate.

The effect of acquisition by conquest is, to vest all the national rights of the conquered, in the conqueror, and because all right to the soil among Indian tribes was national, none individual, the right of soil, as well as of sovereignty, passed to the conqueror. The conquerors "took to themselves what was not wanted by the natives." Can we suppose they would be more scrupulous about assuming jurisdiction, than a right to, and, often, possession of the soil?

In the case of *Johnson vs. McIntosh*,<sup>548</sup> the power of an Indian tribe, while enjoying all the independence<sup>542</sup> and sovereignty it ever possessed since the white man first put foot upon their territory, to sell and convey land to an individual and clothe him with the fee simple title, was the subject of controversy. The plaintiff was a grantee of the Indians and the defendant of the United States; the government having purchased from the Indians subsequent to their grant to the plaintiff. I shall give some extracts from the argument in that case, because it contains a lucid and clear exposition of the relative situation of the Indian and the white man, of the jurisdiction inherent in the native tribes and the discovering state. That argument, so far as I shall refer to it, was in the following language: "The uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private

individuals. They remain in a state of nature, and have never been admitted into the society of nations. All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers. Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title in European nations, and this overlooks all proprietary rights in the natives. The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation thus having passed under the dominion of another, is no longer a sovereign state. They are subject to the sovereignty of the United States. *The subjection proceeds from their residence within our territory and jurisdiction.* They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights. The statutes of Virginia, and all of the other states, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them. It is a violation of



the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle, the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they had wandered over, and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive. According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity: for the lands occupied by each tribe, were not used by them in such a manner, as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title by discovery." In delivering the opinion of the court in the same case, Chief Justice Marshall says: "As the right of society, to prescribe those rules by which property may be acquired and preserved, is not and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has

adopted in the particular case, and given us as the rule of our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and christianity, in exchange for unlimited independence. But, as they were all in pursuit of the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."

"Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

"While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a conveyance of this ultimate

dominion, a power to grant the soil, while yet in possession of the natives."

Again—"The United States have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; *and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.*"

With respect to the "relations which existed between the discoverers and the natives," the Chief Justice says, "We will not enter into the controversy, whether agriculturists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by the Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this

title, or to sustain one which is incompatible with it.

“Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

“The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old.

“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms, every attempt on their independence. What was the inevitable consequence of this state of things? The Europeans were under the necessity of either abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the

adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society; or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred.

"Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

"However extravagant the pretension of converting the discovery of an inhabited country into conquest, may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."

Comment upon the foregoing extracts, from both the argument and opinion, would seem to be unnecessary. The plain positions taken by counsel and sustained by the court are, that discovery and conquest, as they relate to the title to the lands of the North American continent, are convertible terms, the one applicable to the other civilized powers; the other to the natives. That the European power, whose sub-

jects or citizens made the discovery, was acknowledged the sovereign of the territory thus discovered, *from the fact of the discovery*, by every other nation in Europe, and considered the natives as a conquered people; although from the numbers, the fierceness and warlike character of the Indians, actual possession was obtained by these new masters in the manner deemed most politic; sometimes by gradual encroachment; sometimes by what was termed a purchase, though the consideration was always very inadequate, in most instances merely nominal; and sometimes by the sword. The title in fee to the soil, even while the possession remained in the Indians, was universally admitted to be vested in the discovering state; was so recognised in this case of *Johnson vs. McIntosh*, and was granted either to individuals or companies, as was thought proper, and the grantees always adjudged, by every court, to hold an indefeasible estate, notwithstanding it was not convenient for the possession to accompany the grant.

And what was the situation of the sovereignty or jurisdiction? Did it not stand in precisely the same predicament? The cases to which we have referred uniformly treat the "dominion" as in the European state. It is true, actual jurisdiction was not exercised over all these erratic people, and why was it not? Because it was not politic or convenient to exercise it; but as fast as the circumstances of the whites would allow them to exercise it, it was done.

In support of these positions, especially as to the right of jurisdiction, I would refer, also, to the able opinion of Justice Baldwin, in the celebrated case of "*The Cherokee Nation vs. the State of Georgia*," decided in the Supreme Court of the United States in

January, 1831. He says, " While dependent themselves (the colonies) on the crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians; and this is the first assertion by them of rights as a foreign state, within the limits of a state. If their jurisdiction within their boundaries has been unquestioned until this controversy; if rights have been exercised which are directly repugnant to those claimed; the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing, and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government has acted for forty-five years; and force, by mere judicial power, upon the other departments of this government, and states of this Union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the Federal and State Constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union, must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of the government; denied by all, through all time; unclaimed till now; and now declared to have been called into exercise, not by any change in our Constitution, the laws of the Union, or the states; but pre-existent and paramount over the supreme law of the land."

Happily for us, although two members were in favor of doing so, the court did not make a decision, the consequences inevitably resulting from which were thus clearly portrayed by this able jurist.

20 Johns.  
Rep. 188.

In the case of *Jackson vs. Goodell*, in the Supreme Court of New York, Chief Justice Spencer, in his opinion, uses the following language: "These Indians are born in allegiance to the government of this state, for our jurisdiction extends to every part of the state. We do not mean to say, that the condition of the Indian tribes, at former and remote periods, has been that of subjects or citizens of the state. Their condition has been gradually changing until they have lost every attribute of sovereignty, and become entirely dependent upon, and subject to our government. *I know of no half way doctrine on this subject.* We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the Indians, or we have no jurisdiction over their lands, or over them, whilst acting within their reservations. It cannot be a divided empire; it must be exclusive as regards them or us."

Have we not in all these cases, clear proof, that, in the understanding of all the civilized world, a discovered Indian country was a conquered country: that the new sovereign always so considered it, and exercised the rights of a conqueror over his new subjects? The English monarchs generally used moderation towards the natives, it is true, but this was prompted by policy and humanity, and a just regard to the opinion of mankind. And is the judiciary to overturn the political course of the country, and by an investigation, not of law and precedent, but of abstract right, to determine that all this course of



policy has been wrong, and not only wrong, but illegal? Never can I assume such responsibility. It is not for the Courts, no matter what may be their opinion on abstract right, to interfere. In the language of Chief Justice Marshal, "however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."

I will refer to one other decision of the Supreme Court of New York, and close this part of the case.

About the year 1828, Soo-non-gize, otherwise called Tommy-Jemmy, a Seneca chief, was indicted for the murder of an Indian woman of the same tribe. It appeared in evidence on the trial, that this woman had been charged with an offence, which, according to the usages of that tribe, was capital. The offence was charged to have been committed by her in the Seneca country, within the state of New York, and she was there tried, according to their mode, found guilty, and executed. Tommy-Jemmy was the chief who conducted the trial, and ordered the execution. For this act, he was arraigned before one of the Courts of New York, and, notwithstanding all these facts were admitted, was convicted and sentence of death pronounced against him. The case was carried to the Supreme Court of the State, by which the judgment was affirmed. It is true, he was not executed, a pardon having been extended to him by the General Assembly. This statute, however, did not proceed upon the ground that the Courts had ex-

ceeded their authority in taking the jurisdiction; far from it, the right of jurisdiction was expressly recognized. The statute was as follows: "Whereas, the Seneca and other tribes of Indians, residing within this state, have assumed the power and authority of trying and punishing, and in some cases capitally, members of their respective tribes, for supposed crimes by them done and committed in their respective reservations, and within this state: and whereas the sole and exclusive cognizance of all crimes and offences committed within this state, belongs of right to courts holden under the constitution and laws thereof, as a necessary attribute of sovereignty, excepting only crimes and offences cognizable in the Courts deriving jurisdiction under the constitution and laws of the United States: and whereas, it has become necessary, as well to protect the said Indian tribes, as to assert and maintain the jurisdiction of the courts of this state, that provision should be made in the premises:

*"Therefore, Be it enacted,* That the sole and exclusive jurisdiction of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offences committed within any part of this state, except only such crimes and offences as are, or may be, cognizable in courts deriving jurisdiction under the constitution and laws of the United States, of right belong to, and is exclusively vested in, the courts of justice of this state, &c.

"And whereas, it has been represented, that Soon-gize, otherwise called Tommy-Jemmy, an Indian of the Seneca tribe, has been indicted for the murder of Caughquawtaugh, an Indian woman of the same tribe, which murder is alleged to have been commit-

ted within the Seneca reservation, in the county of Erie; and whereas it is further represented that said murder was committed under the pretence of authority derived from the councils of the chiefs, sachems, and warriors of the said tribe; and under the then existing circumstances, it is deemed by the legislature expedient to pardon him.

*"Therefore, Be it further enacted, That the said Soo-non-gize, otherwise called Tommy-Jemmy, be, and he is hereby fully and absolutely pardoned of and from said felony."*

Such is the language of this statute, and such were the judgments of the inferior and Supreme Courts of New York; in neither of which it was ever for a moment supposed the respective departments, or either of them, exceeded their powers. The legislature of that state, in this act, asserts the jurisdiction of their Courts over its whole limits, and that the powers which the Indians exercised, of punishing under their own laws, for offences committed among themselves, was an "assumed power." Will it be said that the Senecas, and other tribes within that state, live on "*reservations*" within the counties of the state, and therefore must be subject to its laws! I ask, what difference can this possibly make? They still constitute distinct tribes or nations, inhabiting lands which they have never ceded. The word "*reservation*," as applied to Indian country, simply means lands which they did not part from by sale, or sold or otherwise yielded up the rest of their territory. They made these reservations as *tribes* or nations, they occupy them as nations, and whether they be many or few in number, whether their country be more or less extensive, they have all the rights

which pertain to an Indian tribe. Their being embraced in counties laid out by the state, can make no difference in *their* rights; if so, the Alabama statute receives all the aid which this circumstance can give it: but this act of the state cannot affect their right to independence. Yet, while each tribe still lived together as one people, the Courts of New York consider them within their jurisdiction without the aid of a statute.

Is not Alabama as sovereign as New York, and do not the Creeks occupy to this state, the same situation which the Senecas do to that? The Creeks live upon lands which they reserved when they ceded the rest of their territory; our counties embrace the whole of the country they inhabit, and, if the doctrine of the legislature and Supreme Court of New York be sound, it would be "assumed power" in the Creeks to try and punish members of their tribe under any authority derived from their chiefs, &c. "The sole and exclusive cognizance of crimes and offences committed within this state, belongs of right to Courts holden under the constitution and laws thereof, as a necessary attribute of sovereignty."

It is not the extent of country which forms an independent state, but it is the exercise of that independence.

Vattel, (page 58) says, "every nation that governs itself under what form soever, without any dependence on a foreign power, is a sovereign state." So that one of the Hanse towns, although surrounded by the dominions of a neighboring monarch, constituted a sovereign state, because governed by its own authority and laws.

There is no instance of a civilized state having

been considered as forfeiting its sovereignty, from the circumstance of having lost, by the chances of war, a part of its possessions, much less from having ceded it by treaty. If the Indian tribes ever were independent of the states in which they lived; if at any time the states had no authority to extend their jurisdiction over them, they continued independent while having a common "habitation and a name," no matter how greatly reduced in numbers or importance, and all the old states have committed aggressions upon them by interfering with their internal policy.

By what right did Massachusetts, Connecticut, New York, Virginia, in fine, all the colonies, forbid individuals from purchasing lands from the Indians, if they were sovereign nations? Had they not as much right to invite emigrants among them; to offer inducements to the settlement and cultivation of their immense territories; to embrace within their bosom, and cover with the protection of their institutions and jurisdiction, those who were thus drawn to their country, as any other people? Yet it appears never to have entered the minds of either white or red, that settlers upon Indian lands became Indian citizens, and were covered by the panoply of Indian law. Surely as one of these sovereigns, an emigrant might have secured to himself such right as the rest possessed, to the use of the spot which he cultivated while he lived upon it: but no; all contracts of individuals with the Indians for their lands, were declared void, by a power which, according to the modern doctrine, had no jurisdiction over those lands.

But when the substance of things is looked to, is it not most absurd to talk about the *purchases* which the early settlers made of Indian lands? By the

statutes of Massachusetts, &c., all contracts, agreements, &c., made with an Indian are declared to be void.\* These people, chiefs and all, are like infants, pronounced incapable of protecting their own interests. Yet these persons, who have not a sufficient capacity to be permitted to make a binding contract to the amount of a dollar, are intelligent enough fully to estimate their national interests; to meet the learned and wily European as diplomatists, make treaties by which they are again and again yielding up millions of acres of fertile land, and all this is done on terms perfectly reciprocal! A few strings of red beads, a hogshead or two of tobacco, with a bale or two of coarse cloth, form an ample consideration, when given by *treaty*, for any extent of country which the cupidity of the white man might induce him to

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\*Extract from act of Massachusetts passed in 1805. Sec. 3d. "From and after the passing of this act, no bond, bill, or other specialty in writing, *or any contract whatever*, nor any book account, or verbal contract, or promise for the payment of money, shall be deemed good and recoverable against any of the said Indians, if the same shall not exceed the sum of four dollars, unless such bill, bond, specialty, or verbal contract, shall be approved by one at least of said guardians."

Act of Connecticut of 1725. "No person shall be allowed or admitted to prosecute before any assistant, or justice of the peace, or court of judicature in this colony, any action of debt or detinue, for any goods, sold, lent, or trusted out, to any Indian or Indians whomsoever."

Act of Rhode Island, 1718. "From and after the publication of this act, no process shall be granted, nor suit be received or lie before any justice or justices of the peace, assistants of courts of trials in this colony, against any Indian or Indians for debt to be made or contracted by such Indian or Indians, at any time after the publication hereof."

Act of New York 1813. "No person shall sue or maintain any action on any bond, bill, note, promise, or other contract, hereafter to be made against any of the Indians, called the Stockbridge Indians, or of the Seneca tribe or nation, nor against any Indian residing in Brothertown, or on any lands reserved to the Oneida, Onondaga, or Cayuga Indians, &c."

Acts were passed by all the colonies, rendering void any contract for lands made by a white man with an Indian or Indians.

ask, and the ignorance of the red man cause him to sell!

If this be the real state of the case, let these unholy acquisitions be immediately surrendered; let the remnants of the once numerous and powerful, but ignorant tribes, be collected together, and honestly told that our ancestors have used their superior knowledge to cheat and defraud them; we now wish to do them justice by giving back all that extensive domain which has been thus iniquitously occupied. Let us make restitution; the rents and profits will amply compensate us for first cost and improvements.

But if we believe these "roving bands" did not use the country they "*overran*," that, finding it in a state of nature, our forefathers were justifiable in clearing away the forests and cultivating the fields formed by their industry, and in bringing the Indians into subordination to them by the best means which policy and humanity dictated; let us continue to act in the same way, and while we enjoy the rich returns which Providence blesses our labors in this fertile region, let us do all that we can to civilize, christianize, and perpetuate the Indians who remain among us.

After a patient and laborious investigation, I can find nothing, either in ancient charters; the conduct of any European power, or the opinion of any respectable writer of older date than 1825, which tends in the remotest degree to countenance the opinion that the Indian tribes have ever been considered as distinct and independent communities. In the language of Chief Justice Marshall, in the case of *Johnson vs. McIntosh*, "discovery gave an exclusive right to extinguish the Indian title of occupancy

either by purchase or conquest; and gave them" (the discoverers) "also, a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise." "The circumstances of the people" did not "allow them to exercise" jurisdiction over many of the tribes within the limits of the colonies at an early day." Those tribes lived beyond their reach or control, and wandered over immense forests which the people of the colonies never had penetrated, and within and beyond which, they had no intercourse. But so fast as these forests disappeared before their extending settlements, and those once distant tribes were brought within reach of the laws, and in contact with the settlements of their civilized and more powerful neighbors; so far, in fine, "as the circumstances of the people would allow them to exercise" jurisdiction and sovereignty over their persons and their country; thus fast they were brought under the influence of those laws, and compelled to yield to that jurisdiction and sovereignty.

Whenever the Indians residing within the chartered limits of a colony, have made war upon it, they have been declared *rebels*, and their "destruction" authorised. No declaration of war has ever been made against them from their earliest history; and by the constant practice of the federal government, since the adoption of the constitution of the United States, the President has ordered troops against them, including those nations with which treaties have been made, without waiting for any movement in Congress on the subject, and his authority to do so has never yet been questioned. From the earliest day, we are informed by Douglass in his history of the British



settlements in North America, "when the country of the Indians at war with us lies upon our own frontier, but without our grants, I call it a war, in the common acceptance; if within our grants, but without our settlements, I call it an eruption; in our proclamations against them, it is called a rebellion, as in all the New England wars with the aborigines; if intermixed with our settlements, it is an insurrection."

It might be well in taking leave of this part of the cause, to look for a moment at the consequences which would result from a decision adverse to the constitutionality of the law. Not that consequences would ever authorise a Court to shrink from its duty; but they should always have their influence where the law of a case is doubtful.

If this state has not the right to exercise jurisdiction over the Creek nation *now*, when will it have the right? Some tell us, whenever the number of that people dwindles down to a few hundreds, or the extent of their country to a small compass. But suppose one of these events were to take place without the other: the number of the tribe is reduced to insignificance, but they retain all their territory; or they cede three fourths or nine tenths of their country, but their population, instead of diminishing, increases; what is the consequence of this state of things? How would it be were they to establish a code of written laws, divide their lands into small tracts, and convey them to the individuals of their nation in fee simple? Are they to be permitted to form such a government among us, and to adopt a policy calculated to make this state of things perpetual? Besides, what then is to become of the paramount title to these lands, so often decided by the Supreme

Court of the United States, to reside in the general government?

It is obvious that unless the act of the General Assembly which we are now considering, can be carried into execution, the Creek Indians, may establish and maintain a separate government forever, and the State of Alabama would have within its borders another and a distinct sovereignty; an *imperium in imperio*.

Where such consequences would ensue, something must be wrong, and the error would be in the decision producing them.

The second question which presents itself is; have not the states, since the declaration of independence, all the powers on this subject, which the King of Great Britain had before, except so far as they have surrendered them to the United States?

This has never been controverted. The states by that event, became sovereign and independent, and clothed with all the privileges and powers of sovereign nations. Among the powers essential to sovereignty is that of jurisdiction. Let us inquire, have the states, by the adoption of the federal constitution, relinquished their right of jurisdiction over the Indians within their limits?

By the tenth article of the amendments of the Constitution it is declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Have the states delegated their right to jurisdiction over the Indian tribes?

The word Indian is used only twice in the Constitution.—In the 2nd section of the 1st article, it is pro-

vided, that "representatives and direct taxes shall be appointed among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and *excluding Indians not taxed*, three fifths of all other persons."

Here certainly is no delegation of power to the United States, but rather an expres recognition of the rights and sovereignty of the states, over the aborigines. So far as Indians are taxed, they are, in express terms included in apportioning representatives, and viewed as inhabitants of the states, because the apportionment is directed to be made according to the population of the states; but words of exclusion are used with respect to those not taxed; which could only have been made necessary by the belief that, being within the limits and jurisdiction of the states, they would be embraced by a general phraseology, comprehending all persons within such jurisdiction.

In the 8th section of the same article, it is declared, "the Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the *Indian tribes*."

It has been contended in the argument, that this clause yields up every right of the states to the United States in relation to the Indians, and the domain they occupy. But where are the words which convey this meaning? The power to regulate commerce with the Indian tribes is relinquished, but what idea does that convey? It is insisted that by this expression it was intended, to give to the general government, and that alone, the power to regulate all *intercourse* with the Indians; I do not understand it

in this way. Has the Congress the power to regulate the whole *intercourse* between the states? To prescribe terms upon which the citizens of different states shall carry on correspondence and every communication with each other; or would this clause, unrestrained by any other, confer such a power? No one would answer in the affirmative, and yet the expression in relation to the commerce of the states, is as comprehensive as that which respects commerce with the Indian tribes—the phraseology is identical.

*Commerce* relates to trade; *intercourse* may be carried on without trade. Commerce, therefore, includes no intercourse but that which consists in trade or traffic; and certainly does not include jurisdiction. In conferring upon Congress the power “to regulate commerce with the Indian tribes,” even admitting them to be the tribes within their limits, the states had no more intention to surrender their sovereignty over those tribes, than they had to divest foreign nations of jurisdiction within their own territories by placing in the hands of the federal government the power to regulate commerce with them.

And not only does a correct construction prove this, but the conduct of the states since the adoption of the constitution. New York, Maine, &c., have governed the Indian tribes within their limits by their own laws. All the tribes living in those States have, long since, been brought under the action of their courts; nor has the first man, either in Congress or out of it, been heard to raise his voice and sound the alarm, that the constitution of the United States had been violated.

But it is said, that these tribes are few in number and surrounded by a white population.

These circumstances, then, terminate a power vested by the constitution, in the United States, without any declaration in that instrument that they shall produce such an effect! Such an argument is too extravagant to need an answer.

I, deem it unnecessary to examine the statutes passed by Congress on this subject. Were it admitted that they assume all the power contended for, which it is not; if the constitution does not embrace it, the states retain it, notwithstanding any thing on the United States statute book. It is contended, however, that the grant of the treaty making power by the constitution, and the subsequent treaties which have been made with the Creek Indians by the general government, deprives this state of the jurisdiction which it claims.

By the 10th section of the 1st article of the constitution it is declared, that "no state shall enter into any treaty, alliance, or confederation, &c.," and by the 4th article, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Several treaties made with the Creek nation by the United States, by which the former have ceded considerable districts of country, contain a stipulation, by which the latter guaranty the remainder of their lands to the former.

These treaties, it is urged, form part of the supreme law of the land, as much as the constitution itself, and strip the states of all right to interfere, in any way, with the possessions or internal government of the Indians.

It might be replied that the act extending the jurisdiction of the state over them, in no way violates this guaranty ; but under the view I take of the constitution, it is unnecessary to investigate its effect in this respect.

I can not for a moment believe, that it was ever intended, by the framers of the constitution, or the states which ratified it, that compacts within the Indian tribes should be embraced in the above provision: conventions with independent sovereign nations, were alone contemplated. This construction, is, I think, supported by the 2nd section of the 2nd article, which is in these words: "He" (the President) "shall have power by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls," &c.

Here, to the power to make treaties, is immediately added that of appointing ambassadors: showing that the treaties usually entered into through the agency of regularly accredited ministers, were alone contemplated. Has a minister to an Indian court ever been appointed under this provision of the constitution? Certainly not. The President has, ever since the establishment of our present form of government, authorised such persons as he saw proper, to treat with these nations, without the advice and consent of the Senate. He has on this subject, as well as that of prosecuting war against the savages, acted without consulting either house of Congress. It is true, the practice has prevailed of submitting these *treaties* to the Senate for their ratification, but why

it has been done, unless to secure, more certainly, the necessary appropriations by Congress, it is difficult to say.

The treaty making power is, in Great Britain, a prerogative of the crown. The King appoints ambassadors to foreign courts, and acts upon all treaties made by them, either ratifying or rejecting them, and no treaty is obligatory, as such, until thus ratified. But of all the contracts or treaties, term them as we may, which were ever entered into by the colonies or by agents of the crown, with the Indian tribes, not one, so far as I can learn, was ever thus ratified. They took effect from the time they were concluded between the chiefs of the tribe and the agent, whether he was appointed by the colony or King, and in all respects were conducted as contracts between the monarch and his subjects.

If the constitution had intended to give to negotiations, which had previously been conducted and concluded with so little form and solemnity, all the sanctity and the high character of treaties formed with sovereign states, and to have placed them, not on the footing of other contracts, but that of the constitution itself, by making them, equally with it, the supreme law of the land, surely some plain expression of such intention would have been made use of, and as the power to "regulate commerce with the Indian tribes," was defined in so many words, the high character of treaties with those tribes would have been as plainly expressed.

It seems manifest to me that treaties with the Indians were never intended to be, and are not embraced by this provision of the constitution; that the history of the intercourse between the crown,

the colonies, the states, and the United States, and the Indians, proves this. The United States, however, are bound by their contracts with these tribes, and can not, either in morality or justice, violate at pleasure, the agreements they have made with them. If they have stipulated any thing they cannot perform, they must satisfy them by a reasonable equivalent. No treaty, however, contains stipulations conflicting with the exercise of jurisdiction by this state. The integrity of their country is guaranteed to the Creek Indians: be it so; this state has no right to the soil in that country either present or prospective. The fee resides in the United States; to the Federal Government, Georgia relinquished it, and in that government it is vested. The power of the United States to continue the Indians in the possession of the country they now occupy in this state, and to remove intruders from among them, I have never denied; but our right of jurisdiction can not be taken from us without impairing our sovereignty.

The constitution of the United States declares that, "no new state shall be formed or erected within the jurisdiction of any other state" without its consent.

I would ask those who contend against our right of jurisdiction, if the effect of their doctrine is not a virtual violation of this provision? If the Indians, as distinct sovereign states, can by treaty or in any other way, be perpetuated among us; if we can not reach them by our statutes; if they can be encouraged to adopt a regular system of laws, a written code for their government: is not a new state formed within this; are not our limits in truth, contracted, by so much as is included in this "new state?"



But it is argued that to many of these treaties, Alabama constitutes a party; that our Senators in Congress have advised and consented to them, and our representatives have taken a part in carrying them into effect; and thereby we have yielded our rights which conflict with their provisions, if such there be.

To this doctrine I can never agree. The people of this state can not be deprived of inalienable rights, by the acts of their representatives in Congress, if they had, in the name of the state, expressly relinquished them. But what is the fact? From the time Alabama has assumed the station of an independent state, a great part of the territory within her limits has been occupied by Indians of different tribes, wretchedly poor in their condition, and excessively indolent in their habits. The great interest of the state, and the object to which she has looked with the deepest solicitude, has been the removal of the Indians, and the opening of the territory occupied by them to a valuable population. Every treaty which has been made, has, in a measure, promoted this important object. It could not be expected, then, that Alabama would object to those treaties. She has always looked forward with confidence to the time, and has expected that it would soon arrive, when the whole state would be freed from its Indian population by the means which were in operation, to the mutual satisfaction of the red and the white man, and has been desirous that, in this way, it might be done. But when the Indians have been reduced to such narrow limits, and arrived to such a condition that a sound policy requires that they shall be embraced by our laws; and when too, indications have

been given by them of a disposition to cede no more of their lands, but to establish themselves as a permanent nation among us; the time has surely come when we should at once, exercise our sovereignty co-extensively with our limits.

I have thus far treated this question as if Alabama were one of the original thirteen States. I have now to examine the last point which was made in the argument against the validity of the statute, viz : that Alabama has relinquished her right to exercise this jurisdiction.

The Union is formed of Independent Sovereign States, which have combined together to secure their own safety, and the happiness of their citizens. In forming this combination, and establishing a Federal Government, nothing has been given up tending to destroy their individual sovereignty. Had this been done, our general government would not be *federal*, but *consolidated*. It follows from the nature of things, that whenever a new member is added to this family of States, it is received with the same sovereign rights and privileges which belonged to the older members; it does not come in as an inferior, but as an equal; and if any exaction were made of a new State at all inconsistent with its sovereignty, it would be void, because that would be stipulated to be surrendered which is essential to sovereignty; and its being received into the Union as a sovereign State, would avoid any such suicidal stipulation.

On this subject, however, it is only necessary to appeal to the Constitution of the United States, and the different acts of Congress, by virtue of which, Alabama has been admitted into the Union.

By the 3d section of the fourth article of the Con-

stitution of the United States, it is declared, that "new States may be admitted by Congress into this Union." If new States are admitted into "this Union," it must be as the old States have been, that is, by becoming parties to the compact which bind the old States together. They must come in under the Constitution. "This Union," means the Union formed by this instrument or Convention: none can be received unless upon relinquishing to the federal head such powers as have been relinquished by the States which formed the Union, and all shall be secured in every political right which is secured to the first members.

In the year 1787, which was before the adoption of the Constitution of the United States, an ordinance was passed by Congress "for the government of the territory of the United States, north west of the river Ohio." By that ordinance, it was provided that there should be formed in the said territory not less than three, nor more than five States" and that such States "shall be admitted, by their delegates, into the Congress of the United States, *on an equal footing with the original States, in all respects whatever.*"

By the articles of cession which were agreed upon between the State of Georgia and the United States, in the year 1802, which was after the adoption of the Constitution of the United States, by which Georgia ceded to the United States the whole of the country now included within the State of Alabama, it is expressly provided, "that the territory thus ceded, 'shall form a State and be admitted as such into the 'Union, on the same conditions and restrictions, with 'the same privileges, and in the same manner as is 'provided in the ordinance of Congress on the thir-

'teenth of July, 1787," (the one just referred to) "for the government of the western territory of the United States."

In 1819, Congress passed "an act to enable the people of the Alabama Territory to form a Constitution and State government, and for the admission of such State into the Union, *on an equal footing with the original States.*" The latter clause of the 1st section declares, that "the said territory when formed into a State, shall be admitted into the Union, upon the same footing with the original States, *in all respects whatever.*"

This act defines the boundaries of the new State, which include the district of country occupied by the Creek Indians.

If Alabama is sovereign at all, she is so throughout her whole territory, and she can not be sovereign unless she has the right of jurisdiction. The right of soil she may not have, her citizens may own the whole of that, or the government of the United States may possess the fee in the greater part of it; yet, while this government exercises jurisdiction over it, or has the power to do so, her sovereignty is not impaired; but the moment she loses this power over any part, if it be but a single acre, her sovereign character, as to that part, is lost also.

The Creek country is either within this state, or it is not. The act of Congress for the admission of Alabama into the Union, passed in conformity with the compact with Georgia, in defining the boundaries of the state, includes that country; it then forms a part of Alabama. It is urged, however, that the state might agree *not to exercise* its jurisdiction over a part of its territory, and yet be sovereign, although

bound by this agreement; and that in the ordinance adopted by the convention which formed our state constitution, such an agreement was made.

Waiving an inquiry into the binding effect of such an agreement if made, I can not find that such an one was ever made.

The 6th section of the act of Congress "to enable the people of the territory of Alabama to form a constitution and state government," contains certain propositions for the benefit of the state, which were "offered to the convention of the said territory, when formed, for their free acceptance or rejection." A proviso to that section is in the following words: "that the said convention shall provide, by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said territory, do agree and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States; and, moreover, that each and every tract of land sold by the United States, after the first day of September, in the year one thousand eight hundred and nineteen, be and remain exempt from any tax laid by the order, or under the authority, of the state, whether for state, county, township, parish, or any other purpose whatever for the term of five years from and after the respective days of the sales thereof: and that the lands belonging to citizens of the United States, residing without the said state, shall never be taxed higher than the lands belonging to persons therein, and that no tax shall be imposed on lands the property of the United States; and that all navigable waters within the said state

shall ever remain public highways, free to the citizens of the said state and of the United States."

An ordinance was adopted by the convention accepting "the propositions offered by the act of Congress."

The act under consideration violates no part of this proviso. The right of the United States to the waste and unappropriated lands in Alabama, is not invaded by the statute, nor is any attempt made to lay a tax on the lands of the United States, nor of non-residents. I do not deny but that such attempts as these would be exceeding the powers of our Legislature, though many eminent men are decidedly of opinion that the Federal Government had no right to require any such terms of us; that they violate the compact with Georgia, the Constitution of the United States, and our inalienable rights, by placing us on an *unequal* footing with the older States, and depriving us of the power of levying taxes on a great portion of the real estate within our jurisdiction; which power, it is contended, is necessary to sovereignty. And in my opinion, although I do not subscribe to this doctrine, it is much more rational than the one which maintains that this State, although sovereign, has no right to exercise jurisdiction over one-third of its territory.

The only other restraining provision to be found in the act of Congress "to enable the people of Alabama Territory, to form a Constitution, &c." is contained in the proviso to the 5th section. "That the same (the Constitution) when formed, shall be Republican, and not repugnant to the principles of the Ordinance between the people and States of the territory north west of the river Ohio, so far as the same has been extended to the said territory, by the articles

of agreement between the United States and the state of Georgia, or of the Constitution of the United States."

The ordinance last referred to contains several "articles of compact" which it declares shall be "unalterable unless by common consent," that is, the consent of the states interested, and the United States. The 3d article, it is alleged, is violated by the statute under consideration. So much of the article as it is necessary to notice, is in these words. "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars, authorised by Congress; but laws founded in justice and humanity, shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

The object of this article, is to secure the observance of "the utmost good faith towards the Indians," by the new states: the subsequent clauses only specify the manner in which this "good faith" is to be observed.

1st. "Their lands and property shall never be taken from them without their consent."

The act of our general assembly does not take from the Creek Indians their lands or property. It does not disturb the possession of an individual, but leaves every member of the tribe in the enjoyment of his "lands and property," be they much or little.

2nd. "In their property, rights, and liberty, they shall never be invaded or disturbed."

By the words "rights and liberty," I do not sup-

pose is meant, "rights" claimed by them to the destruction of the rights of the states, nor a "liberty" to do every imaginable act, unrestrained by law. I understand it to be intended that justice shall be secured to them fully and completely, and that their freedom shall be as perfect and unrestrained as that of any citizen in the land.

It is argued, however, that the extension of our laws over them is an invasion of their "rights and liberty," as it necessarily abrogates *their* laws and usages which they prefer, and which they were governed by when our constitution was adopted.

If it was intended by the framers of this article to give them rights as nations, the most unfortunate language has been used for that purpose. They are spoken of as *Indians*, not as *nations*, and the word "liberty" has been employed in a manner which must convince the mind that it is individual liberty which is intended.

The substance of the whole article is, that these people shall be secured by proper laws, and a correct administration of justice, in their persons and property; that on account of their liability, from their ignorance, to be overreached and defrauded by the white man, they shall be protected by suitable laws to be enacted for the purpose. They shall be viewed somewhat as minors, and as wards of the state, receive that degree of care and attention which their situation, and peculiar liability to injury requires.

But the idea that to secure the "rights" of the Indians, the state was to relinquish some of those most important to her, and place herself in something of a state of pupilage to, and dependence upon the savage tribes within her boundary, can not be tolerat-



ed for a moment. We are almost surrounded by these children of the forest; were we to yield all that is claimed for them, in a short time we might, and, I doubt not, would, feel the effects of their "independence." Our citizens might be prohibited by these new sovereigns from carrying on intercourse with several of the neighboring states, except by the one or two path ways which they have agreed with the United States should be open to them; most intolerable exactions might, even then, be made of them. For offences, either pretended or real, charged to be committed by them while journeying through the dominions of these sovereigns, they might be dragged before their chiefs and other head men, and upon the most crude and unsatisfactory testimony, be consigned to ignominious or fatal punishments.

These and an hundred other causes, would produce a constantly increasing feeling of enmity between the white and red man, especially those who lived near each other, and frequent affrays, riots, and homicides would be the consequence. In fact, a kind of border warfare would always exist between them; and the only effective way to comply with the injunction of the ordinance, "to prevent wrongs being done to the Indians, and preserve peace and friendship with them," is to bring them under the protection of our laws.

This subject has been much mooted throughout the United States for the last three or four years. In the controversies which have been carried on between the state of Georgia and the Cherokee nation, the feelings of a great proportion of our population has been warmly enlisted in behalf of the latter, and, on

all occasions, my sympathy for the Indians has been great.

I have remembered that, comparatively, but a few years since, they were the undisputed lords of this immense continent; that, unmolested by the white man and ignorant of his existence, they pursued their game through the interminable forests which spread themselves in every direction; that indulging in a freedom unrestrained as the air, they coursed their immense and trackless wilds, changing their situation and country as fancy dictated, or as the powerful inducement of a greater abundance of game operated upon them. But the European has landed upon their coasts! Before his perseverance and industry, the towering forests have fallen; the wild deer have fled from his presence; the Indians too have receded with the game, until their once extensive domains are reduced to small townships, and even there the chase can be pursued no longer, the game has totally disappeared. I look around for their numerous hunters and warriors, they are only to be found in the chronicles of past times; in numbers, the race has rapidly diminished, many of the most powerful tribes are extinct; and the rest seem to be fast tending to the same end; and I feel a deep anxiety that some plan should be devised, to avert this, their too probable destiny.

Such reflections excite a warm interest in behalf of the Indian, and we listen to his complaints fully prepared to believe that he has been injured.

Similar feelings have been general throughout the union, and, doubtless, they have often controlled the intellect, and commanded the judgment, when form-

ing an opinion upon the rights of the states over these rude nations.

But when we contemplate the change which has been wrought in this once savage wilderness, by the arts, the industry, and the superior knowledge of the new population; when we visit our thronged cities, smiling fields, and happy habitations; when we contemplate our numerous bays and harbors, once the resort only of the wild fowl and the inhabitants of the deep; now studded with ships and vessels of all sizes and nations, pouring upon these lands the rich and extensive commerce of a whole world; when, instead of a roving tribe of hunters, we behold a powerful nation of agriculturists, as free in every desirable liberty, as their savage predecessors; when our happy political institutions and the religion of the Bible, have displaced their barbarous laws, and wretched superstitions; can we wish these effects of civilization, religion, and the arts, to disappear, and the dark forests and roaming Indian again to possess the land? Are we not compelled to admit that the superintending providence of that Being who first formed the earth, is to be seen in this mighty change?

Such is my conviction: and much as I may sympathise with the savage, when giving the opinion that the law awards the superiority to his civilized neighbor, I am cheered by the belief that the decision of the law, in this, as in other cases, will be promotive of the best interests of the whole country.

My opinion is, that the judgment should be affirmed.

1sp446  
109 150CROCKET *versus* TROTTER & M'GONEGAL

Where a note, executed by a party, and payable in cash notes, is taken up by the substitution of notes on other persons, which are endorsed; the first contract remains uncanceled, unless an express agreement exists to substitute the liability of the endorsement.

This was an action of assumpsit, and was brought to recover the amount of a note of hand, executed by the defendants in error to the plaintiff. The note had been taken up by the substitution of notes on other persons, which the defendants had indorsed. On the trial below, it was insisted, that the first note became cancelled by the acceptance of the notes, given over in payment of it; and on this question, the Court charged the jury, that unless there was an express agreement to the contrary, the receipt of the indorsed notes operated as a discharge of the defendants obligation, and that the plaintiff's recourse was on the indorsement. To this charge there was exception taken, which brought the case to this Court.

*McKinley*, for Plaintiff.—*Ormond* and *Hopkins*, *contra*.

LIPSCOMB, C. J.—The plaintiff sold a stock of goods to the defendants, and received from them their three notes of hand—the first, for eight hundred and ninety one dollars and twenty-eight cents, payable in cash, on the first day of January, one thousand eight hundred and twenty-one: the second, for the same amount, due at the same time, payable in cash notes, on solvent men in Giles, Tennessee: the third note

was for three thousand five hundred and sixty five dollars and fourteen cents, due on the first day of January, one thousand eight hundred and twenty-two, payable in cash notes, on solvent men in Lawrence county, Alabama.

The two first notes were paid ; when the last fell due, the defendants transferred by endorsement, notes to the plaintiff, to the amount of their note, which was given up to them. The plaintiff brought suit for the non-payment of this last note, averring that the defendants had not paid him the amount thereof in cash notes on solvent men in Lawrence county.

There was proof on trial, that the makers of some of the notes were not solvent. There was no proof of any notice of non-payment to the endorers. The Judge charged the jury, that if they believed the defendant endorsed the notes to the plaintiffs, and received from him their note, payable in cash notes on solvent men in Lawrence county, that it operated as a discharge of said note, and that the defendants were only liable as endorers of the notes so received by the plaintiff, *unless* there was an *express* contract proved, that it should not operate as a discharge of the note for the payment of cash notes on solvent men, in Lawrence county. To this charge the plaintiff excepted, and now assigns it for error.

From the view of the case, taken by the Court, it will not be necessary to examine very closely the authorities referred to in the argument.

We believe that it mainly depends on the intention of the parties at the time the payment and endorsement of those notes occurred. If it was intended that the old note or agreement, for the payment of cash notes on solvent men, should be cancelled, and

that the liability of the defendants, as endorsers, should be substituted in lieu of that agreement, then it is clear that the plaintiff would be compelled to resort to the endorsers, in their character as such, on the failure of payment by the makers. But the mere fact that he received the notes indorsed from the defendants, and surrendered to them their own note, would not, of itself, necessarily imply that the relations of endorser and endorsee attached to the parties, and the legal inference to be drawn, under the circumstances of the case, would be, that the notes had been endorsed, not in pursuance of a new contract, but in conformity with the old one. If so, and the notes, or any part of them, were unproductive, after due diligence on the part of the plaintiff, the original agreement would be, *pro tanto*, unsatisfied. The defendants could not compel the plaintiff to relinquish his security, under the agreement that he would be paid in cash notes on solvent men, in which he should be comparatively passive, and throw on him the active diligence of an endorsee, bound to use the strictest attention to fix the liability of the endorser. Had the plaintiff sued the defendants on their endorsement, we believe that they might well have defended themselves on the grounds that they had not assumed the responsibility of endorsers, and were not liable until the insolvency of the maker should be made to appear. In making this defence, the original contract would sufficiently explain the object of the endorsement, without violating the rule of evidence laid down in *Sommerville vs. Stephens, et al.*—that the endorsement could not be explained by parol. In almost all the cases referred to, bills or notes had been received in payment or discharge of a direct promise to pay

money, and the doctrine of those cases is, that the intention of the parties to the transaction, must govern it.

It seems to the Court, that the converse of the proposition assumed by the Judge, in his charge, is the true one ; and that unless there was an express agreement that the liability on the endorsement, should be substituted, that the first agreement remained uncanceled, and unpaid, by the endorsement.

The judgment must therefore be reversed, and the cause remanded.

SAFFOLD, J. not sitting.

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STANDEFER, Claimant, *versus* CHISHOLM, Plaintiff in Error.

It is a rule, applying to conveyances, both of real and personal property, that where a legal and equitable title are united, the latter is merged in the former. So, a *cestui que trust*, for whose security a trust deed has been executed, may take an absolute *bona fide* conveyance of the trust estate, and the latter becomes merged in the former.

Where the interest of a defendant in execution is perfectly balanced between the claimant and plaintiff, he is a competent witness for either party, and must be produced; and evidence of his declarations, is not admissible.

The gratuitous declarations of an agent, as to the ownership of property entrusted to his charge, are not evidence: if competent, he must be produced in person.

This was a proceeding in Madison Circuit Court, to try the right of property in certain slaves, levied on as the estate of Skelton Standefer, to satisfy subsisting executions in favor of the defendant in error.

So much of the extensive testimony as related to the decision in this cause, shewed the following facts. Before the judgments had been obtained, under which Chisolm's executions were levied, Skelton Standefer, to secure and indemnify Jesse Standefer against extensive liabilities, as a surety, executed a deed of trust of the slaves, jointly to the said Jesse Standefer and one William Patton. Patton was authorised alone, by the tenor of the deed, to dispose of the slaves whenever it became necessary for the security of Jesse Standefer. Some months thereafter, Skelton Standefer conveyed the same slaves, by absolute bill of sale to Jesse Standefer, and delivered them into his possession. The latter having employed one Samuel W. Standefer as his agent, sent the slaves out of the State, when they were hired as Jesse Standefer's property, for some time. On the return of the slaves to this State, Samuel W. Standefer became the assignee of the judgments against Skelton Standefer, and caused the present executions to be levied on the slaves in question.

On the trial below, it was proposed, with other testimony, to admit the declarations of Skelton Standefer to be given in evidence to the jury. These declarations did not appear to be relevant, nor was Skelton Standefer a party to the present proceeding.—The Court, however, admitted the evidence. The claimant then offered in testimony the declarations of Samuel W. Standefer, while agent, as to the ownership of the slaves; which was rejected. The Court then charged the jury, that the deed of trust executed by Skelton Standefer in the first instance, divested him of the legal title to the slaves, and that, consequently, he was precluded from subsequently convey-



ing them by absolute deed of sale to Jesse Standefer; and that that deed of trust not having been acknowledged by the parties, and recorded, was void, so far as the plaintiff in execution was concerned. The jury found the property subject to the executions, and the charge of the Court, together with its decision as to the declarations of Skelton Standefer and Samuel W. Standefer, being excepted to—it was assigned to this Court as error.

1st. That the Court erred in admitting the declarations of Skelton Standefer to go to the jury.

2d. That the Court erred in excluding the declarations of Samuel W. Standefer.

3d. That the Court erred in its charge to the jury.

*Ormond and Thornton, for Plaintiff.*

*Hopkins and McKinley, contra.*

SAFFOLD, J.—Executions having issued in favor of the defendant in error, against Skelton Standefer, the brother of the plaintiff in error, they were levied on slaves, in the possession of said Jesse Standefer, as the property of the defendant in execution. Prior to the rendition of the judgments, Skelton Standefer had, by deed of trust, conveyed the slaves to Jesse Standefer and William Patton, in trust, to indemnify and secure the former against responsibility to a large amount, which he had contracted as security to said Skelton Standefer. The conveyance was to J. Standefer and Patton jointly, but with authority to the latter alone, to sell the slaves in the manner prescribed, if found necessary, for the indemnity of the former. More than twelve months thereafter, but previous also, to the date of the judgments, Skelton

Standefer executed his absolute bill of sale, and thereby conveyed the negroes to Jesse Standefer, and delivered them to him accordingly. It was also shewn in evidence, that on Jesse Standefer's taking possession of the slaves, by virtue of the absolute conveyance as aforesaid, he procured Samuel W. Standefer to carry them to the state of Mississippi, as his agent, where they remained on hire as the property of the claimant, Jesse Standefer, for a considerable time, and until, through the continued agency of Samuel W. Standefer, they were brought back to this state, and again taken possession of by Jesse Standefer, residing in Madison county. In the mean while, however, Samuel W. Standefer had, by transfer and assignment become the proprietor of the judgments in favor of Chisholm: executions on these judgments were then levied on the negroes. These facts, and others referred to by the assignments of error, appear from the exceptions taken on the trial. Jesse Standefer having claimed the property according to statute, issue was joined between him and the plaintiff in execution, to try the right. The trial resulted in a verdict, finding the slaves to be the property of Skelton Standefer, the defendant in the executions, and subject thereto. From the judgment thereon, the claimant prosecuted this writ of error, and assigns as causes:

1. The Court erred in admitting the evidence of R. Manefee and B. Manefee, respecting the declarations of the defendant in execution, to go to the jury, the same being objected to by the claimant's counsel.

It is not contended that these declarations constitute any part of the *res gesta*, or that the persons making them were a party to the suit; but it is in-

sisted by the counsel for the defendant in error, that the contest involved an alleged fraud, in which he was implicated, and that there was a community of interest and design between him and the claimant. It is admitted to be a correct legal position, "that a community of interest or design, will frequently make the declaration of one, the declaration of all."<sup>2d Stark. cv. 45.</sup> It is so with respect to partners, and makers of joint and several promissory notes, and some other joint responsibilities; but it is not believed that the doctrine has ever been, or can safely be so far extended as to identify several persons on the ground alone, that they are supposed to have participated in practicing fraud. A conclusive objection to this course would be, that the judge would be reduced to the necessity of arrogating to himself the right of determining the fact that a fraud had been committed before he could determine the admissibility of the testimony. This he is incompetent to do, for the declarations of one in this situation might be the first evidence offered, or there might be no other: besides, if, before such testimony should be offered, there be proof of the most glaring fraud, it is the exclusive province of the jury to determine its effect; and before they can do so, all the evidence must be before them, and it must have been closed. It may also be remarked, that if the defendant in execution was a competent witness for the party who offered proof of his declarations, that consideration alone furnishes a sufficient objection to the secondary evidence.

It is certain, the defendant in execution was not entirely indifferent as to the result of the trial. If the property be condemned, it must be sold for the

satisfaction of his debt—the consequence of which must be, a breach of his warranty of title to the claimant, to whom he had conveyed. If the claimant prevail, his warranty of title, (whether express or implied,) is sustained, and the debt remains unsatisfied against him. His interest would, therefore, appear to be balanced. To disqualify a witness on the ground of interest, it must be a *legal* interest in the event of the suit, or in the record, as contradistinguished from mere prejudice or bias, arising from the circumstances of relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced.”<sup>2</sup>

<sup>2</sup>Starkie's  
Ev. 745.

Where a witness is neutralized by an equipoise of interest, the objection to his testimony ceases; but if he is subject to conflicting interests, one of which preponderates, the difference constitutes an interest which is not countervailed. “The preponderance must, however, in order to disqualify the witness, be certain and definite; for, although it has been held that a witness was incompetent, because it would, in one event, be more difficult for him to recover the same sum of money, than in the other—*Buckland vs.*

<sup>5</sup>T. Rep.  
578.

<sup>2</sup>Starkie's  
Ev. 753.

*Tarkard*” yet the principle of this decision is very dubious, and probably would not now be supported.”

We are, therefore, of opinion, from the rules of evidence stated, and from the authorities referred to, in the brief furnished by the claimant's counsel, that the declarations offered in evidence were inadmissible, and that the defendant in execution, in the situation in which he stood in relation to each party, was himself a competent witness for either.

2nd Assignment—The Court erred in excluding the declarations of Samuel W. Standefer, who was,

when they were made, acting as the claimant's agent ; and afterwards became the owner of the judgments in Chisholm's name.

The evidence here referred to, as having been offered and rejected, is understood to be the part of W. H. Brewer's deposition, in which he states, that having seen Samuel W. Standefer in the state of Mississippi in 1823, in possession of the negroes, &c., he told him those negroes belonged to his uncle Jesse Standefer, and that he had bought them of his father, Skelton Standefer ; that as his father was involved, his uncle was suspicious if he kept them at home, he would have a troublesome law suit about them, and therefore had employed him to hire them out in that country until his uncle would move there, and by so doing, his uncle would avoid all danger of any suit. The record states, that the Court sustained the motion to exclude from the jury the statements contained in said depositions, in relation to the acknowledgments of Samuel W. Standefer, that the property in the slaves in controversy belonged to the claimant ; from which it is inferred that evidence of the gratuitous declarations of the agent respecting the ownership of the property was excluded, not the evidence of his being in possession of the slaves, nor of any particular act done, or contract made concerning them. The latter might be viewed as substantive acts of ownership for his principal, and rest on grounds entirely different from the former. Previous to the time, or independent of the fact of the agent having acquired an interest in the judgments, it is clear that his declarations respecting the ownership of the property, or any contract made by others concerning it, could not have been evidence for his prin-

cipal. As a general rule, agents, factors, servants, and others in a similar condition, are competent witnesses for either party. In many instances they are indifferent, having no interest in the contest, or if they have, their interest is paralyzed. But the law, from the necessity of the case, does not stop here. Persons acting in such capacity are rendered competent as witnesses in relation to acts done by them, according to the directions of their principals in the usual course of business: such is the rule, though they be responsible to the party calling them, or the adversary, unless the action be brought against the principal for the negligence of the agent, and evidence has been given of such negligence; then the agent is, in general, incompetent, without a release; for there, the verdict against the principal would be evidence in an action brought by him against the agent..

\*2 Stark.  
76c-9.

Then can the circumstance of the agent having contracted an interest in, or become the owner of the judgments, destroy his competency as a witness for the claimant, or constitute him a party so as to make his declarations evidence for the other. The law is held to be, that "a witness can not, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony in any proceeding, whether civil or criminal; for the party had a legal interest in the testimony, of which he ought not to be deprived by the mere wanton act of the witness." And according to the doctrine advanced under the first assignment, he can not be regarded as a party for the purpose of making his admissions evidence. Without the newly acquired interest, they would not have been evidence for his principal, more than admissions

\*2 Stark.  
Ev. 751.  
3 Johnsons  
Cas. 234.

of the latter for himself. And while the law denies to the agent the power of depriving his principal of the benefit of his testimony, by contracting an adverse interest, it equally denies the principal the right to claim, from that circumstance, as evidence, what otherwise would not have been. In general, we must look to the record alone, for the *parties* to the suit, and all others are competent witnesses, unless interested in favor of the party calling them. Hence it results, that the claimant must exercise his discretion to introduce his former agent as a witness, or dispense altogether with the testimony.

3d Assignment—The Court erred in the instruction given to the jury, as to the effect of the deed of trust to Patton.

The instructions referred to are, that the Court charged the jury—that the deed of trust from Skelton Standefer to William Patton, divested Skelton of his legal title to the slaves, and disabled him to convey them by the bill of sale which he afterwards made to Jesse Standefer, the claimant; that the said bill of sale, on account of that disability, conveyed no legal title to the slaves, and that the deed of trust not having been acknowledged by the parties, and recorded, was void as to the plaintiff in execution.

The exception respecting the former acknowledgment of the deed of trust, and having it recorded within a limited time, not having been here particularly urged, it is sufficient to remark, that it can have no material influence on this decision, and that according to the doctrine in *Kelloughs vs. Steel*, of the present term, such instruments are not required to be recorded by the statute of frauds, or any of the registry acts, existing at the execution of this deed.

But did the existence of the deed of trust deprive Skelton Standefer, the grantor, of the power, subsequently, to make the absolute conveyance of the same property to the *cestui que trust*. It will be observed, if material, that the conveyance in trust was to Patton and Jesse Standefer, with authority to the former, if necessary, to sell for the benefit of the latter. The absolute conveyance having been made between Skelton and Jesse Standefer, the consent of each must have been united in the deed, and so far as they were concerned, it could amount to nothing else than a rescision of the former conditional conveyance. Then could the trustee, or under his silence, any other, on account of his supposed legal title, object to the validity of the absolute conveyance. The argument, that possibly the trustee was vested with some distinct interest in the trust property; that there may have been a collateral agreement to that effect, and that he may have an individual lien on the property, accruing from his agency, can not influence the question; because the facts do not appear, and we are not authorised to presume them.

\*6 John. C.  
R. 417.

The case of *James vs. Johnson*,\* furnishes authority favorable to the plaintiff in error. It was there held, in reference to lands, that where the legal and equitable titles are united, the latter is merged in the former; that if a mortgagee takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage discharged. This is held to be the general rule both in law and equity; and in equity the merger is prevented, and the distinction of estates preserved, *in special cases only*, as in case of infants,



or others in similar condition, whose beneficial interest requires it.

Without adding other references in support of the same doctrine, which might be done, it is sufficient to say, the above is believed to be the true principle, and that it applies equally to conveyances both of real and personal estate; and that, as the absolute conveyance, united the consent of all who had any beneficial interest in the trust conveyance, neither a mere trustee, or any other, can deny its validity on that ground alone. If the subsequent sale was made for a fraudulent purpose, it was the province of the jury so to pronounce. We are, therefore, of opinion, that according to the first and third assignments, the Circuit Court erred; for which the judgments must be reversed, and the causes remanded for new trials.

The case of *Standefer vs. Mastin*, being similarly situated, must take the same course.

TAYLOR, J. not sitting.

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BELL vs. LAMKIN.

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BELL *versus* LAMKIN.

A. having taken writs of error on sundry suits against him, B, C, D and E, became his sureties on the Bond. A. then executed a deed of trust to B, C, and D, of certain slaves, conditioned for "the payment of the judgments, in the event of their affirmance." Held, that such deed was not made alone for the indemnity of the three sureties named in it, so as to authorise them to appropriate the entire amount of property included therein to their separate liabilities, but that it went generally to the payment of the judgments.

This was a bill in Chancery, filed in Madison Circuit Court, by Lamkin against Bell. One John W. Bell having taken out writs of error on several judgments obtained against him, Lamkin and Bell, together with two other individuals, became his sureties, to the writ of error bonds. John W. Bell then executed to Lamkin and the two other sureties, a deed of trust of several slaves for securing the payment of the judgments in the event of their affirmance. In this deed, R. A. Bell was not included. Afterwards, on the affirmance of the several judgments taken up by error against John W. Bell, executions were levied on the slaves comprised in the trust deed, and they were sold. The judgments remaining unsatisfied in part, the balance was finally collected from Robert A. Bell and Lamkin. Lamkin now filed the present bill against the plaintiff in error, asserting that the deed of trust had been executed for the sole benefit of the parties named in it, and to indemnify them alone. That the property comprised in the deed of trust was sufficient to cover three-fourths of the amount of the judgments and that their affirmance had been procured by a fraudulent collusion between Robert A. Bell and the plaintiffs in the judgments.

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BELL vs. LAMKIN.

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The bill prayed that a decree should be rendered compelling Robert A. Bell to refund the amount collected from Lamkin, which the Chancellor decreed on the bill, answer and exhibits.

The plaintiff here assigns as error, that the Chancellor below erred in his decree, and that the same should have been rendered in his favor.

*Craighead*, for Plaintiff.

LIPSCOMB, C. J.—The facts of this case, so far as they are considered material, are these: one John W. Bell sued out four writs of error on judgments rendered against him; and Neal B. Rose, Francis Haynes, Robert A. Bell, the plaintiff in error in this case, and Griffin Lamkin, the defendant, became his securities in the bonds, for the writs of error. A deed of trust was executed to three of the securities, without naming Robert A. Bell, of several negroes for the purpose of securing the payment of the judgments should they be affirmed in the Supreme Court. “The deed directed that if the judgments, or any of them, should be affirmed, and the said John W. Bell should fail to pay and satisfy the whole or any part of them, within ten days after the said judgments, or either of them, may have been affirmed, then the trustees, or either of them, may proceed, after giving ten days notice of the time and place of sale, to sell so much of the aforesaid property as will be sufficient to pay and satisfy the judgments of the Supreme Court, and the money arising from such sale pay in discharge of the said judgments, together with all necessary costs and charges which may attend the proceedings, and after discharging said judgments and charges, return

the overplus, if any, to the said John W. Bell, his heirs or assigns," &c.

The judgments were all affirmed in the Supreme Court, and executions levied on the property included in the deed of trust: there was no attempt to sell it under the trust deed, but it was sold by the sheriff under and by virtue of the executions levied on it. By the sale of the property three of the judgments were satisfied, and a part of the fourth, leaving a balance of two thousand five hundred and forty eight dollars and sixty-seven cents, unsatisfied. A suit was instituted on the bond for the writ of error in the case, when the judgment was unsatisfied, against Haynes, Lamkin, and Robert A. Bell; (the other security, Neal B. Rose, having before become insolvent, was not sued :) judgment was recovered against them, and execution sued out for the balance. The sheriff collected the amount as nearly as he could, in equal proportions from the three against whom the judgment had been rendered, but not being able to make fully the amount of one-third from Haynes, he collected the deficiency of his part, from Lamkin and Robert A. Bell, making the amount paid by each of the two last, about one thousand and forty-seven dollars and forty cents. Lamkin then filed his bill against Robert A. Bell, the present plaintiff in error, alleging that the deed of trust was for the benefit of the three securities who had been named in it, and to indemnify them, and not for the benefit of the said Robert A. and that as the property so conveyed, sold for and satisfied more than three-fourths of the whole amount of the judgments affirmed, he prayed that Robert A. might be compelled to refund to him the amount col-

lected from him on the judgment, against himself, Robert A. and Haynes.

The bill further charged, that the judgments had been affirmed in the Supreme Court, by a fraudulent collusion, between John W. Bell, Robert A. Bell, and the plaintiffs in the judgment. The answer of Robert A. Bell denies all fraud and collusion, in procuring the affirmance of the judgments, and insisted that the property conveyed by the deed, was intended as much for his benefit as for the other securities. There was some testimony as to the intention of the parties, to the deed of trust; but not important to this investigation. The Chancellor decreed the relief prayed for in the bill; and it is now assigned for error, that there is error in this; that the bill should have been dismissed, with cost, in favor of the defendants, below, instead of decreeing the relief prayed for by the complainant. We presume that the Chancellor must have founded his decree on the assumed ground, that the deed of trust was one of special indemnity to the three securities, named them, and it is beyond question, that it was competent for John W. Bell to have so secured them, if he had been so disposed. If, however, this has not been done by the plain and express terms of the deed, it was not the province of the Chancellor, by a resort to a more liberal construction of the instrument, to so prefer their interest, at the expense of their co-security. Had the property been set apart by the deed, for the special indemnity of the three securities mentioned, and it had afterwards been sold for the debt that all were bound for, Chancery would have been constrained, reluctantly, to decree reimbursement to the favored securities. I say reluctantly; because the claims

of the other security, to be put on an equal footing with those sought to be preferred, would be very strong, and nothing but the imperious necessity of yielding to the express will of the maker of the deed, could justify postponing those strong claims to an equality of indemnity, when there was an equality of liability. Though the law will permit a debtor to prefer one creditor to another, Courts of Equity should closely scrutinize an effort, by a principal, to prefer one security to another. In this case, however, it seems to us, that the clear and obvious intention of John W. Bell, the maker of the deed, has been misconceived by the Chancellor in making his decree in the Court below. He agrees with three, out of four, of his securities, that certain property shall be set apart, not for their special indemnity, but as means of paying and satisfying the judgments, sought to be reversed, should they be affirmed; and the deed assumes nothing more than to place the property embraced by it, beyond the power and control of the maker, on the happening of the stipulated contingency. Without the deed, John W. Bell might have sold and disposed of his property, and put it beyond the reach of an execution, before the affirmance of the judgments by the Supreme Court. Had the trustees carried the deed into strict execution, and sold the property, they would have been bound to apply it in the same way, that its proceeds were appropriated on the sale by the Sheriff, and the three securities named could not have obtained any preference. We are, therefore, of opinion, that the decree of the Court below must be reversed, and the decree here entered, dismissing the bill with cost.

GOODWIN *versus* THE GOVERNOR.

1832  
99  
1832  
104 99

A recognizance to appear at a term of the Court, and answer for an alleged offence; must set out specifically the kind of offence charged to have been committed

Where a party has been recognised to appear at a particular term to answer for a breach of the peace, and the State takes no steps towards a forfeiture of the recognizance, (no indictment or presentment being preferred, or continuance had,) such failure operates as a discontinuance, and discharges the accused.

Cargill and Goodwin were recognised by a Justice of the Peace, in a bond, conditioned that Cargill made personal appearance at a term of Bibb Circuit Court, ensuing the date of the bond, and kept the peace towards one Ward, and another. The condition set out no particular offence to have been committed; and it did not appear from the record that the prosecutor appeared at the return term, or that any measures were then taken in the cause. At a subsequent term, a forfeiture was taken on the recognizance; which Goodwin assigned in this Court, as error.

TAYLOR, J.—There are many assignments of error in this case, several of which it is unnecessary to consider.

The first is, that “it does not appear by the recognizance, that any offence had been committed, which gave the Justice of the Peace authority to bind the original defendant.”

The recognizance is taken in the form of a bond, with a condition. The bond is in the usual form, in which Reuben S. Cargill acknowledges himself bound to the Governor for the time being, and his succes-

sors in office, in the sum of two hundred dollars, and the bail acknowledges himself bound in the sum of one hundred dollars. The condition is as follows :

"The condition of this recognizance is such, that if the above bound Reuben S. Cargill, shall personally appear at the next Circuit Court, to be holden in and for the County of Bibb aforesaid, to do and receive what shall then be enjoined him by the said Court, and in the mean time, shall keep the peace towards the state and all its citizens, especially towards James Ward, the prosecutor, and Clement R. Bedford; then the said recognizance to be void, else to remain in full force

(Signed)

R. S. CARGILL, [Seal.]

NOFLIT GOODWIN, [Seal.]

Acknowledged before me, July 7th, 1824,

CORNELIUS COX, *a Justice of the Peace.*"

When a recognizance is taken by a Justice of the Peace, binding an individual to appear at a Court, to answer, &c., the authority of the Justice to take it should plainly appear, by a specification of the charge which is made against the party. It is not sufficient that he is a sworn officer, and will be presumed to do his duty; he may mistake with regard to that duty, and that it may be known whether he has done so or not, the offence charged against the citizen, should appear in the recognizance. The inference to be drawn from the phraseology of this recognizance, it is true, is that Ward and Bedford apprehended danger of personal violence from Cargill, and that Ward had made oath before the Justice to that effect; but this is by no means certain; Cargill may have been charged with an assault and battery upon those per-



sons, and the Justice conceived himself authorised from this circumstance, to bind him to keep the peace until the Court, at which he was expected to answer. But it is essential to authorize a recognizance to keep the peace, that oath should be made by the party in apprehension, that he has good reason to fear personal violence, or secret injury to his property, from the defendant. The fear of injury by the prosecutor, is the very ground-work of such a prosecution, and one can no more be commenced without it, than a warrant can be issued, or recognizance taken, with a view to a charge of larceny, without such charge having been made or stated. In the latter case, it would be necessary for it to appear from the recognizance, that the accused was bound to appear and answer a charge of the state against him of larceny; so where a man is bound to keep the peace in the mean time, and to appear at the next Court, to be dealt with according to law, it must appear by the recognizance, or by some part of the record, that a prosecutor had made oath that he considered himself in danger of receiving injury from the accused in his person or property. As it is not shown by the record in this case, that any such oath was taken, and as the recognizance does not bind Cargill to appear and answer any particular charge, there is, in this respect, a material defect.

The next assignment is, that "the forfeiture was taken at a time, subsequent to that at which the party was bound to appear."

It appears that the recognizance was entered into in July, 1824, requiring Cargill to appear at the next term of the Circuit Court of Bibb county. The

next term, the law informs us, was held some time in the succeeding autumn. The first step which was taken by the Court in this case, was at the Spring Term, 1825. One Court, then, must have elapsed without any notice having been taken of the cause, and the effect of this would be, a discontinuance. In a case, of the kind which this is presumed to have been, that of a recognizance to keep the peace, if in no other, the failure of the state to proceed at the return term, would amount to a discharge of the accused. Although no statute prescribes the duty of the Court to which such recognizance is returned, yet the law does require that the defendant shall be bound by the recognizance, to appear at the next term of the Circuit Court of the County, &c., and that the recognizance shall be returned to such term. The uniform practice is, if the prosecutor appears, and, on oath, makes a satisfactory showing that his reasonable fears still continue, the defendant is re-bound. But if the prosecutor fail to appear, or appearing, fail to satisfy the Court that there is good reason to continue the defendant under recognizance, he is discharged. In this case, it does not appear that the prosecutor appeared at the first term, or that the defendant was ever called. But at the second term after the date of the recognizance, the security is called upon to bring in the defendant, and failing to do so, a forfeiture is rendered against him. This is clearly error, as there did not then appear to be any proceeding against him. My own opinion is, that had this been a recognizance to answer the state upon some charge exhibited against the defendant, and an indictment

or presentment had been found at the first term, and the case have been regularly continued, by either the state or defendant, and a forfeiture taken at a term subsequent to the one at which the cause had been so regularly continued; the proceedings would have been regular, although the recognizance did not, in terms, require the defendant to appear from term to term, but only at the first term. The obligation to appear and answer would continue in all its force, while the prosecution was regularly going on, and it would be unnecessary for the recognizance to be renewed to secure this object. But it is not important to decide what would be the effect of such a recognizance in the case supposed. To controvert the position, that the forfeiture was illegally entered at the second term, there having been no step taken at the first, the case of *Robinson & Davenport* against *Starr*, decided at the July term, 1830, of this Court, is referred to. That was an original attachment: a writ of garnishment was served, on the debtor of the defendant. The statute requires that a garnishee shall appear and answer at the first term, or a judgment *nisi* shall be rendered against him, upon which a *scire facias* shall issue. The garnishee did not appear at the first term, nor was any interlocutory judgment rendered against him. This Court decided that such judgment might be entered at the second term, and that no discontinuance was produced by its not being done at the first. But in that case, the suit against the original defendant was regularly continued; the proceeding against the garnishee was a collateral matter, no final judgment could have been rendered against him until a recovery was had against

the original defendant, and no such final judgment could be had at the first term, because the statute required a continuance of the case, and publication to be made, giving notice to the original defendant of the pendency of the action. The steps taken by the original parties to the suit, operated as a continuance of the proceedings against the garnishee, and no injury could possibly result to him by the postponement of the interlocutory judgment, as the final judgment could not be rendered without calling upon him to appear and defend.

Here the case is entirely different. Cargill was recognized to appear at the first term; then, if not further prosecuted, the proceeding was at an end; at any rate, he and his bail had a right so to consider it, and it might never again be in the power of the bail to produce him.

As the case has not been argued, and a decision on these two points is sufficient to make a final disposition of it, it is considered improper to determine upon the power of the Circuit Court to amend the interlocutory judgment, and some other proceedings which are assigned as erroneous.

The judgment is reversed.

**BARTON, et al. vs. THE BANK OF THE STATE OF ALABAMA.**

In a proceeding against a sheriff and his sureties, for failure to pay over money collected on an execution, it is necessary to prove who the sureties are.

This was a motion against Barton and others, for the failure of Barton to pay over money collected by him as sheriff, on an execution in favor of the Bank. The record did not disclose that any evidence was submitted to the Court below, to shew who were the sureties of Barton; which was assigned as error to this Court.

*Lyon, for Plaintiff—Bagby, contra.*

LIPSCOMB, C. J.—Several objections have been taken to the record in this case. We shall notice only the most prominent.

The notice from the President of the Bank, is directed to Benjamin Barton, sheriff, and William H. Clark and William Barton, his securities, that a motion would be made, to recover judgment against them for the amount of an execution in favor of the Bank, collected by the sheriff, and which he had failed to pay over. The motion was made by the attorney for the Bank, for judgment against Benjamin Barton, sheriff, and William Barton and John McGrew, his securities, and judgment awarded, and entered up against all three of them, omitting the name of William Clark, whose name was in the notice, and taking up John McGrew, whose name was not there, and who does not appear from the record, to have received notice at all. There does not appear from the

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CARLTON, et al. vs. KING.

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\* Minor's  
R. 376.

record, to have been any evidence, to prove who were the securities of the sheriff: this was necessary to be proven, according to the case of *McWhorter's Securities vs. Marr, et. al.*\* If such proof was essential to a right of recovery against the securities, it should appear to have been made, in as much as it was a summary proceeding, in which they were sought to be charged for the default of their principal.

There are several other irregularities, apparent on the record; but, as the judgment must be reversed for those we have already considered, we shall forbear noticing them.

Let the judgment be reversed.

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CARLTON, et al. versus KING.

In a trial of the right of property between a claimant and a plaintiff in execution, it does not devolve upon the latter to produce the judgment on which the execution issued—and the production of the executions is sufficient between the parties contesting.

In error from Bibb Circuit Court.

Sundry executions against Thomas Carlton, in favor of the defendant in error, being levied on certain property, the same was claimed, under the statute, by the plaintiffs. It was assigned for error in this Court, among other matters noticed in the opinion, that the Court below admitted the executions under which the property was seised, to go to the jury, without proof of the judgments.

*Gordon*, for Plaintiff—*Clarke*, *contra*.

TAYLOR, J.—The assignment of error in this case, relates entirely to the matters stated in the bill of exceptions.

The first exception states, that certain executions were offered as evidence by the plaintiff, which were objected to by the defendants because the judgments on which those executions issued were not produced, or proved.

This case originated in a claim of right, made in conformity with the statute, by the Carlton's, to certain property, which had been levied on by a constable in virtue of various executions, which he held in favor of Edmund King, against Thomas Carlton, their father, issued by a Justice of the Peace. The right to the property was tried before the magistrate who issued the executions, and it was found by the verdict of the jury to be in the defendant to the executions; from the judgment rendered upon that verdict, the claimants appealed to the Circuit Court, and on the trial there, the opinions were given which are now to be revised.

Many authorities have been cited by the counsel for the plaintiffs in error, to show, that in an action instituted by a stranger to an execution against a Sheriff, and he justifies under the execution, that he must produce a copy of the judgment, as well as the execution on the trial. This rule has been so long recognised in England, and so often in the different States of this Union, that we should not feel disposed to disturb it in a case in which it was applicable; indeed, this Court, in the case of the *Tombeckbee Bank* against *Godbolt*, has clearly recognised it. But

2 John. R.  
46—ib. 280  
2 Pick. R.  
211.

we are now to determine whether that rule is to be extended further than it has already been ; and before we do this, we should look into the principle upon which it is founded. And here we are almost immediately at fault. In the cases decided in the Courts of our sister States, in which it is recognised, no other reason is given for it, but that it is a uniform rule of law.\* And why it is that the execution itself affords sufficient justification, when the defendant to it brings the suit against the sheriff, and does not, when a third person is the plaintiff, it is difficult to determine.

In *Buller's Nisi Prius*, 234, we find the following paragraph : "In an action of trespass against a bailiff, for taking goods in execution, if it be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of *feri facias*, without shewing a copy of the judgment: but if the plaintiff be not the party against whom the writ issued, but claims the goods by a prior execution, (or sale,) that was fraudulent, then the officer must produce, not only the writ, but a copy of the judgment: for in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass; but in the other case, they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within 13 *Eliz.*, for which purpose it is necessary to shew a judgment." But in what way the officer, by producing the judgment, brings himself within the statute referred to, is not mentioned. The case in 1st *Raymond*, 733, which is often referred to, and



appears to be a leading one, contains no reasoning, but merely lays down the distinction, as maintained by the subsequent authorities. The Sheriff acts under the execution ; that is his authority ; if by virtue of it, he levies on the defendant's property, he would suppose he ought to be protected ; but if he levies on the property of a third person, he is liable to damages, no matter how formal, regular and valid the judgment may be.

But with respect to the rule of law, when a case of the kind occurs, *ita scripta est* would govern my decision. No case like the present, however, has been produced, to which the rule has been extended. No Sheriff, or other officer, justifies here ; it is a simple contest between the plaintiff and defendant, with regard to the ownership of property. I am not ready with the counsel of the defendant in error to say, that if the judgment against the original defendant were void on its face, that the claimant could take no advantage of it ; but I am ready to say, that it does not devolve upon the plaintiff in the execution, to show that the judgment is valid ; but upon the production of the execution, a valid judgment should be presumed until the contrary appears.

There was, therefore, no error in admitting the executions as evidence, without proof of the judgments.

The next exception to the opinion of the Court is, a refusal to instruct the jury, as was asked by the claimant's counsel ; and to this there are two branches.

1st. That although they should believe the deed marked A, (from claimant's father to them, under which they claimed,) was executed, as it was proved to be, on a consideration, not deemed valuable in law,

yet a good consideration would support and sustain it, against the creditor who afterwards contracted with the person making the deed, and who knew it had been made before he gave credit to the person who had executed it.

2nd. That a man not in debt may give property absolutely, or in trust, for the benefit of his children, and that the conveyance will be supported against a subsequent creditor, with notice of it.

There is nothing in the record to show, that the last branch of the instruction asked, was at all relevant to the case. It may have been altogether abstract and irrelevant, and the Judge, in the opinion, as given in the record, declares that he refused so to instruct the jury, because such instruction would have been entirely inapplicable to the case.

As to the first branch of this exception, it appears that the deed purports to be one of bargain and sale, from the father to the children, and the consideration acknowledged in it to have been received by the father, was \$1500. This, it is admitted, was never paid. Without attempting to investigate the doctrine relating to the necessity of stating the true consideration in the deed, where one is stated at all, in the decisions on which there is probably some contrariety, it is sufficient to say, an abstract instruction could not have been legally given in the terms asked by claimant's counsel. According to the instruction asked, a conveyance for a good consideration, that is in consideration of blood, would be valid against a person who had notice of it, and became a subsequent creditor, although he knew also that it was made with the avowed intention of defeating creditors. It is impossible for us to say, but that evi-

dence to that effect was given on the trial; the same witnessed who proved the knowledge of the plaintiff that the deed had been executed, may also have established the actual fraud of the whole transaction. And surely, it will not be contended that a conveyance for good consideration, made with the intent to cheat creditors, is good against any person, whether he be a previous or subsequent creditor, or whether he have notice of the conveyance or not. There was no error in refusing the instructions asked.

The last point raised by the bill of exceptions is as follows:

The claimants, by their counsel, asked the Court to charge the jury, that the Justices' executions not having been proved by the Justice, or any other person, there was no sufficient evidence that they were genuine, or that they were ever issued by a person legally authorised.

The Judge refused to give this charge, assigning as his reason, that the objection was made too late.

It is obvious, from the record, that the executions had been read to the jury without any objection, except the one which was first overruled, that the judgment should first be proved, the whole evidence then followed, and the argument was closed, if an argument was made, before the exclusion of the executions was asked for. A slip of the counsel in not proving that the Justice issued them, if that was necessary, should not have been permitted to be taken advantage of in this way. The witnesses by whom the proof could have been made, might have been discharged, and, if the objection had availed, doubtless it would have been urged that additional evidence should not have been received, even had it

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PITCHER & REMSEN VS. PATRICK'S ADM'RS.

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been at hand. The claimants had permitted the evidence to be introduced without objection; it was calculated to secure the justice of the case, and without it, great injury would have resulted to the plaintiff. Under the circumstances, it would have been improper for the Court to have wrested it from the jury.

There was no error in this opinion of the Court. The judgment is affirmed.

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PITCHER & REMSEN *versus* PATRICK'S ADM'RS.

The fact of lines being drawn through the face of a bond, or note, is to be regarded as presumptive evidence of its being satisfied or cancelled.

But such fact is proper for the determination of a jury, before whom, either party can legally explain the circumstances under which the marks were made.

In error from Tuskaloosa Circuit Court. Patrick's representatives brought an action of debt against the plaintiffs in error, to recover the amount of a sealed note. The instrument was made payable to Patrick, in his life-time; and when produced in evidence, on the trial, had two lines drawn through the body of it; which, it was contended, was *prima facie* evidence of its being paid—and so, not evidence of the demand, against the defendants.

The Court, as appeared by a bill of exceptions, permitted the note to go to the jury, as evidence; but instructed them that the lines drawn across the note, were not sufficient evidence that the same was paid.

Verdict for plaintiff below, and writ of error.

*Baylor*, for Plaintiffs—*Aikin*, *contra*.

SAFFOLD, J.—The action was debt, brought by the defendants against the plaintiffs in error, on a note under seal, drawn by Pitcher & Remsen, payable to Patrick, in his life-time, for three hundred dollars. The pleas were payment, and set-off, and failure of consideration. The record shews there had been a previous trial, when Remsen offered an account against Patrick in evidence, as a set-off, for the rejection of which the judgment then rendered, was reversed on error.

On the second trial, which we are now to revise, the note was offered in evidence, when, as appears from the bill of exceptions, two lines had been drawn, with pen and ink, transversely, through the face of the note, crossing each other, and extending over the entire instrument, including the names of the makers. The defendants' counsel objected to the note as evidence, and contended that the cross lines so drawn was sufficient evidence that the note had been cancelled or paid; which objection the Court overruled, and suffered the note to go to the jury as evidence of said debt, "and charged the jury that said crossing was not sufficient evidence of cancelling or payment."

In the decision and charge mentioned, the Circuit Court is supposed to have erred.

That the note, crossed as it was, remained admissible evidence and proper for the consideration of the jury, either with or without explanation, I think sufficiently clear. The record shews nothing contesting the facts, that the present plaintiffs executed the

instrument, and that the same was originally valid, according to its import : unless it could be inferred that the instrument having been cancelled at the time it was drawn, was never intended or delivered as a bond. This, however, under the issue mentioned, can not be presumed ; for had such been the case, the obligors, instead of the implied admission of the execution, arising from their pleas, should have availed themselves of the plea of *non est factum*. Could the cross lines be regarded as an *erasure* or *interlineation*, in legal parlance, the defence ought to have been the same ; but it can not be so considered : the effect of either would be to vary the reading, which these lines had no tendency to produce. The law is held to be, that, among the variety of other matters of defence, under the plea of *non est factum*, the defendant may prove, "that the deed was cancelled before the plea ; that a material *erasure* was made in the deed, or that the seal was torn off before the plea ; but this, it seems, is but presumptive evidence of such an act on the part of the obligee as will cancel the deed ; for the latter may shew that the seal was torn off by accident ; or that the alteration was made by a stranger, in a point not material, and without his privity. But an alteration by the obligee himself, even in an immaterial point, will, it is said, avoid the deed."<sup>a</sup>

<sup>a</sup> 2 Starkie, 480 and authorities cited there.

As the cancelling or crossing this paper, has not the effect to vary its contents, and as it is presumed from the pleas to have been done since the issue was joined, the argument, on the part of the defendant in error, can not prevail, which insists that this ground of defence can only be claimed under the plea of *non est factum*.

It is also contended, on the authority of *Smith vs. Woodward*,<sup>24 East, 585</sup> referred to in 2 *Starkie*, 476, note b— “that if the seal be broken off in Court, the deed shall be enrolled for the benefit of the parties; for, where any thing is impaired whilst in the custody of the law, it is restored by the benignity of the law as far as possible.” If it be true, that, after a deed has been pleaded with a profert, it is, according to the English practice, considered in the custody of the law, we can not disregard the well known fact, that the more common practice with us, is otherwise. The usual course here, is understood to be, that the plaintiff's counsel retains possession of the evidence of his demand until the trial comes on; and even, if a new trial be granted afterwards, the instrument, whether remaining in the files of the office, or not, becomes again subject to his control. How far craving *oyer* of the bond by the defendant, and having it spread on the record, would abridge this authority and control of the plaintiff, it is unnecessary to enquire, as in this case there was no such claim. It is clear the defendant can, at no time, exercise any legitimate power over the plaintiff's evidence of debt, until it is surrendered to him. If, therefore, at any time before a final trial, the note or bond on which the action has been brought, undergo any alteration, or receive any impression, indicating its destruction or satisfaction, it would appear to be but a necessary and reasonable requisition on the plaintiff that he should afford the explanation. If the act done was the result of mistake or accident; or if any effect was designed by it different from its ordinary import, he alone must be presumed to know the circumstances, and to possess the means of explanation.

As a case supporting this doctrine of presumption, may be noticed a New-Hampshire decision—*Chesley vs. Frost*.<sup>a</sup> There it was held, that a material alteration of a deed of land, while in the possession of the grantee, is *prima facie*, fraudulent, and is presumed to have been made by the grantee himself.<sup>b</sup>

<sup>a</sup> Adams,  
145.

<sup>b</sup> Am. Dig.  
185.

<sup>c</sup> Minor's R.  
129.

An early decision of this Court, (*Tubb vs. Mad-ding*,<sup>c</sup>) has some application to the question involved in this case. Tubb sued on a note on which credits appeared to have been endorsed, which had been *erased*. It did not appear that any evidence of explanation was offered by either party. On error, it was ruled that the Circuit Court should have left it to the jury to determine, whether from the evidence and circumstances, the credits had been entered by mistake, or fraudulently erased, and to what amount payment had been made: that, though the credits remained legible, the Circuit court was not authorised to instruct the jury to allow them. If an unexplained erasure of an instrument, while in the possession of a person to be benefited thereby, is to be received as evidence of the destruction of the writing, surely a similar alteration of a deed, while in the possession of the party to be prejudiced by its destruction, must furnish a stronger inference or presumption against its validity. We do not now express any opinion respecting the authority of that case; but we maintain that the cross through the face of the bond, in this case, was evidence tending to shew that it had been cancelled or satisfied, and that the jury should have been instructed to regard it as presumptive evidence thereof. The Circuit Court decided correctly in permitting the instrument to go as evidence to the jury; and either party should have been allowed to explain the cir-



cumstances under which the cross was made. If, however, no other evidence was introduced on either side, (as appears to have been the case,) it was the province of the jury to draw such inference from the circumstances as appeared to them rational and just, either in favor of, or against the validity of the demand.

But, for the defendants in error, it is further contended, that this matter of defence must have arisen subsequent to the commencement of the suit, and even after the pleas were filed; and therefore the defence is not sustainable. On the contrary, it is insisted that the cancelling or crossing the bond while in the possession of the obligee, or his representatives, may be construed as an admission of an earlier payment, even before the issue was joined, or the suit commenced; but that this is immaterial, for the defendant below was entitled, as a defence, to any satisfaction at any time before the trial. In support of this latter position, the case of *Baylies, et al. v. Fettyplace, et al.* is cited. In that case, *Sedgwick, J.* who appears to have been sustained by the Court, held, that <sup>7 Mass.R. 334.</sup> "in all cases of *assumpsit*, whatever shews that a complete satisfaction has been received by the plaintiff *before the trial*, may be given in evidence under the general issue." He remarks further, "that before the decision of the case of *Birds vs. Randall*," it might have been doubted, whether such a satisfaction could be given in evidence under the issue of *not guilty*, in an action for a *tort*; but it ought never to have been a doubt, whether there was a distinction between those cases, where the satisfaction was made *before*, and those where it was made after the commencement of the suit. In the reason, nature, or <sup>3 Barr. 1345.</sup>

justice of the thing, there can be no such distinction." The case of *Birds vs. Randall* appears to have been an action for a *tort* committed by seducing the plaintiff's journeyman to leave his service. The trial was had upon the general issue, when, on objections made, the Court decided, "that a full satisfaction, *after* the commencement of the action, and *before the trial*, need not be pleaded, but might be given in evidence under the general issue."

A decision of this Court may also be invoked in aid of the same principle. The case of *McMillan vs. Wallace*,\* was an action of *assumpsit*, for use and occupation. The pleas were the general issue, payment and set-off. On error, the Court recognised as a general rule, that no matter subsequent to the commencement of the suit, can be given in evidence under the general issue; but sustained the position, as an exception to the rule, that evidence of subsequent, partial payment, may be admitted. That the plaintiff, however, in such case, is entitled to recover his costs at least. And, as respects the objection, that the plaintiff would be in danger of surprise from this course, it was remarked, that this danger or inconvenience was not materially different from that to which plaintiffs are often subject, under different circumstances; and, should it so happen, the remedy must be by an application for a new trial.

At present, we decline a farther investigation of the doctrine, whether our former decision fixed a proper standard of reduction, by evidence of subsequent satisfaction—Whether the plaintiffs demand can only be reduced so as to leave a balance in his favor to carry costs, or whether by such defence his action can be entirely defeated, as seems to be the doctrine of

the other cases referred to. A definite adjudication on this point is not essential to the decision of the present case.

It may be remarked that payment or satisfaction of a demand, pending a suit for it, can only be made, with the knowledge and consent of the plaintiff or his agent; and if he has consented to deprive himself of the evidence of his claim, or to destroy it, he has no just ground of complaint. The error we find in the record, is confined to the opinion of the Circuit Court, which instructed the jury, that the crossing the bond as described, "*was not sufficient evidence of canceling or payment,*" we think that was a matter of fact which they had a right to determine; and for which the judgment must be reversed, and the cause remanded.

LIPSCOMB, C. J. not sitting.

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BARTON, et al. vs. F. & E. PECK.

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BARTON, et al. *versus* F. & E. PECK.

In a proceeding against a sheriff and his sureties, under the act of 1825, for failing to pay over money, it is requisite to allege in the notice, by special averment, that the money had been demanded, and by whom that demand was made.

But a verdict will cure the defect, if the record shew proof of the fact.

Such proceedings are not limited to the period during which a sheriff holds his office, but may be instituted after that period has elapsed.

Damages at the rate of five per cent. per month, in such cases, are allowed, from the time the demand is proved to have been made, until its collection.

In error from Marengo Circuit Court.

This case originated from a notice, served on Barton, late sheriff of Marengo county, and his sureties, that a motion would be submitted to the Circuit Court of said county, on a day therein named, for judgment and award of execution for a certain sum of money collected by the said sheriff in a case wherein said Pecks were plaintiffs, and one John Craig defendant. And also, for five per cent. per month, damages, from the time the said money was demanded. The notice contained no special averment of a demand, nor by whom made, but the proof of these facts was ample. On the matters being left to the determination of the Court, and on the objection that the notice was insufficient, the Court gave judgment for the plaintiffs below, together with five per cent per month, from the time of the demand. On this judgment Barton took error to this Court.

*Lyon*, for Plaintiff—*Stewart*, *contra*.

TATLOR, J.—This is a summary proceeding under the act of 1825, against Benjamin Barton, late sheriff

of Marengo county, and his securities, for failing to pay over to the plaintiffs a sum of money which he had collected by an execution in their favor.

Three points are made by the defendants in error.

1st. That the notice is defective.

2d. That a proceeding of this kind is not authorised against one who has been a sheriff, but whose term of office has expired before it is commenced.

3d. That the damages at the rate of five per cent. per month, allowed by the statute, could only be awarded to the time at which the suit commenced.

The defects alleged in the notice, are two, viz :— there is no special averment that a demand had been made of the money alleged to have been collected by said Barton ; nor is it stated by whom the said Barton was requested to pay the same.

The statute provides, in substance, that when any sheriff has collected any money upon execution, and shall, upon demand made thereof, fail to pay the same to the person entitled thereto, the person entitled to receive the same, shall, upon giving one day's notice to such sheriff, recover against him and his securities, on motion before any Court having jurisdiction thereof, the sum of money so collected, with five per cent. per month thereon from the time the same shall have been demanded.

To recover the damages of five per cent. per month, there is no doubt it is material to prove a special demand, and the time at which that demand was made ; and wherever a demand or notice is material to be proved, it should be averred in the declaration ; it should also be averred by whom this demand was made.

In 1st *Chitty's Pleadings*, 323, '4, it is said, " when an actual request is essential to the support of the

action, a special request must be stated, and it must be shown by and to whom the same was made, and the time and place of making it, in order that the Court may judge whether the request were sufficient." There can be no doubt about the correctness of this position. In a case like the present, it is as important a fact as any which is to be proved, and that a demurrer to a notice omitting it, would be sustained, there is no doubt. But it is insisted that this defect is cured by the verdict, or by the statute of *jeofails* of 1824. *Chitty* in the page last cited, proceeds to say: "it should seem that a verdict would, at common law, aid the defect:" and the act of 1824 declares, that no case shall be reversed or arrested for any defect in the proceedings, unless the objection was made in the Court below, provided the record show a good cause of action. Is this then one of those defects, which would be aided by verdict at common law, or by the statute

Although the demand in this case entitles the plaintiff to a much greater recovery than he could have without it, yet the damages can only be viewed as incidental to the debt. It is not because the money is demanded, but because the sheriff has failed to discharge his duty in paying it over, that he becomes liable to the damages. There should be much strictness required in proceedings of this kind, especially where the penalties are so great, and I at first inclined to the opinion, that, as without the demand there could be no recovery of the five per cent. it might be considered as the cause of action for this part of the judgment, and that the failure to aver, it was fatal on error. But upon reflection, I do not perceive that the averment is more requisite here than in other

cases in which it is essential to the proof. In none, can a recovery be had without it : it secures the right of action in the plaintiff, and fixes the liability of the defendant. In cases conducted in the usual manner, it will after verdict, be presumed to have been proved ; and in a summary case, like the present, if the record shews that the proof was made, it will supply the omission in the notice. This record shows that fact.

The next objection to the judgment is, that such a proceedings can only be had against *sheriffs*, and were never intended to be extended to those who had ceased to be such, by the term for which they held their offices having expired, or in any other way.

No authority has been produced on this point, nor an attempt made to sustain it by analogous principles of law. Nor can I perceive any reason for confining the operation of the statute to sheriffs in office. Frequently, after the term expires, a person who has filled this office, collects large sums of money ; in fact, he continues a sheriff, vested with all the power and authority of one so far as relates to the unfinished business of his office. If he can not be reached for monies which he collected during the continuance of his term of office, he can not be for that which he collects afterwards. There could be certainly no reason for making a distinction of this kind ; but the greatest evils would result from a rule of decision like the one contended for, and it would render the law almost inoperative. It is after a sheriff has gone out of office, particularly in this State, that his delinquencies are generally discovered. He only holds his office for a short term, is not eligible, at the next election, and can manage to conceal the majority of his defalcations, for the short time he is in office, and the

most of them often take place towards the close of his time. The policy of the statute would be entirely defeated by the decision for which the counsel of the plaintiff in error contends.

The third objection, that damages at the rate of five per cent. per month, could only be recovered up to the time of bringing the suit, is believed to be equally untenable. The statute awards five per cent. per month damages to the plaintiff "from the time of the demand." If it had been intended that these damages should cease when the suit was brought, it would have been almost useless to give them. The suit is generally instituted very soon after the demand is made, and the inducement to pay the money really due, to prevent his incurring the damages, would be slight indeed, if he foresaw that he would probably pay them for a few days, and might possibly protract the suit for years before a recovery could be had against him. It is said, if they are incurred, another suit must be brought to recover them; but no case is recollected in which a right is withheld from a plaintiff, and his recovery of damages is limited to those which had occurred at the commencement of the suit. There certainly can be no good reason given for their ceasing when the action is instituted, nor, if they continue to accrue, can any be perceived for their not being investigated and decided on without a second suit. The law abhors multiplicity of actions, and to decide for the plaintiff in error on this point, would be a wide departure from that policy.

We do not perceive any thing in the assignment of errors to authorise a reversal; and therefore, the judgment is affirmed.

SAFFOLD, J. not sitting.



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**BILLS OF EXCHANGE AND PROMISSORY NOTES.**

1. The written acknowledgment of a husband, of a note, executed by his wife; though the note may originally have been void in itself; becomes, by such acknowledgment, under the statute of this state, the note of the husband; and it is not necessary to set out in the declaration any consideration on the part of the husband, for such acknowledgment—*Phillips vs. Scoggins.* 28
2. Where an endorsed note is relied on as a set off, such endorsement must be proved. *Cass vs. Northrop.* 69
3. The statute of 1819, exempting plaintiffs, in suits on assigned paper, from proof of the assignment, unless defendant makes affidavit that it is forged; is not applicable to cases, where an endorsed paper is produced as a set off.—*Id.* 69
4. Where a defendant produces an assigned note of the plaintiff, as a set off against the plaintiff's action, the latter may show a total or partial failure of the consideration for which the note was given, either by replication to the plea of set-off, or in answer to the general issue, and notice of set-off.—*Hudson vs. Tindall, ex'r.* 237
5. A paper, promising to pay a certain sum of money for notes, (subject to a deduction for any number not procured,) at two dollars a thousand—held not subject to the same rules of decision which regulate promissory notes; so as to authorise the Court to give judgment on it without the intervention of a jury.—*Martin & Hill vs. Woodall.* 244
6. An effort on the part of the endorsee of a note, to find the maker in order to make a demand of payment, need not be by a personal application at his last place of residence; if it is notorious that such last place of residence has been abandoned.—*Goadin vs. Britain.* 283
7. Under our statute, notes made payable in "notes," are negotiable as though made payable in money.—*Ibid.* 282
8. In an action on a note, payable to a party *eo nomine*, the capacity of the latter to contract and sue is *prima facie* admitted under the plea of the general issue.—*Herbert & Kyle vs. Nashville Bank.* 286
9. Where a note, executed by a party, and payable in cash notes, is taken up by the substitution of notes on other persons, which are endorsed; the first contract remains uncanceled, unless an express agreement exists to substitute the liability of the endorsement.—*Crockett vs. Trotter, et. al.* 446
10. The fact of lines being drawn through the face of a bond, or note, is to be regarded as presumptive evidence of its being satisfied or cancelled.—*Pücher & Remsen vs. Patrick's adm'rs.* 478
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**CANCELLING.**

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**CERTIORARI.**

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**CHANCERY.**

1. Where a party neglects in a suit at law, to take advantage of an entire failure of consideration, then within his knowledge, he will not afterwards be permitted to appeal to equity for relief.—*Isbell v. Morris, et. al.* 41
2. It is competent for Courts of Chancery to relieve a purchaser of real estate from payment of the purchase money, where the vendor cannot effect a title.—*Smith vs. Pottus, et. al.* 107
3. The inability of a vendor, through insolvency, to make titles to real estate sold by him, is a sufficient ground for the interposition of equity to prevent such vendor from enforcing the payment of the purchase money, until such disability is removed.—*Id.* 107

**CHANCERY.**

4. And where a note has been given by the vendee for the purchase money, equity will interpose against its recovery, even in the hands of an assignee if the equitable defence would have availed against the payee.—*Id.* 107
5. Where a defendant's remedy is adequate at law, but at the time of trial such remedy is not understood nor ascertained; the jurisdiction of equity is maintainable.—*Bynum & Sims vs. Sledge.* 135
6. In chancery, all parties whose rights can be affected by a decree, must be *made parties* to the suit, before that decree can be pronounced; but a sheriff, having the mere custody of monies, in litigation, is not such a party as to authorise the dismissal of a bill, because he is not joined.—*Smith, et. al. vs. Rogers & Sons.* 317
7. An answer in chancery, responding to the allegations of a bill, and expressly denying them, will prevail, unless the bill be sustained by the testimony of two witnesses—or of one witness, and strong concurring circumstances. And proof of a fraud between two parties, in a separate and distinct transaction from the one in suit; will not be such conclusive circumstance as will sustain the allegations, denied.—*Id.* 317

**CHARGE OF COURTS.**

1. It is in the power of a party applying for the charge of a Court, to have it specifically applied to every point arising on the evidence; and where the charge is asked in such general manner, as that when given it may not be as explicit as the testimony would authorise; it is not a ground of reversal, that the charge was too general.—*Hunt & Norris vs. Toulmin.* 178
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**CONSIDERATION.**

1. A consideration wholly past and executed will not sustain a promise, unless the consideration arise at the instance of the party promising.—*Shaw vs. Boyd.* 83
2. A gave his note for the rent of a ferry, including eighty acres of land: the County Court afterwards granted the ferry to another. In a suit brought to recover the amount of the note—Held—That A. could show the failure of consideration, which arose from being deprived of the ferry.—*Etans vs. Murphy.* 226
3. The terms *good consideration*, in the 3d section of our statute of frauds, where it is said that "this act shall not extend to any estate, &c., which shall be upon *good consideration*, and *bona fide*, lawfully conveyed, &c.," must be construed to mean *valuable consideration*.—*Kilough vs. Steele.* 262

**CONTRACT.**

1. The rate of interest stipulated to be paid on a contract, in the absence of written or statutory law, may be fixed by a jury, according to the custom of the place, where the contract is made.—*Tate vs. Innerarity.* 33
2. Wherever a defendant can maintain a cross action for damages, on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract; the former may in defence to an action upon his note made in consequence of such purchase or contract, claim a deduction, corresponding with the injury he has sustained.—*Peden vs. Moore.* 71
3. *Semble*, that where real estate is the subject of the contract, the rule above laid down is different—And a partial defect in title, while the contract remains unrescinded, cannot be alleged as a defence to an action for the recovery of the purchase money.—*Id.* 71
4. A party, undertaking to perform a piece of work for another, will be required to complete it according to the contract: but where the work fails after its completion, by any means not within the control of the contracting party, this will not bar a recovery for the price contracted to be paid.—*Hunt & Norris vs. Toulmin.* 178

**CONTRACT.**

5. A. having shipped goods from New York for Mobile, which became damaged on the passage, proceeded to call the Port wardens to view the goods, with the purpose of charging the ship owners. B, the agent of the ship owners promised A that if he would desist, and proceed to sell his goods at auction, he, B, would pay the amount of the loss. In action to recover the amount of the loss from B, held, That the promise was not within the statute of frauds, but that B was liable.—*Travis vs. Allen.* 192
5. A gave his note for the rent of a ferry, including eighty acres of land: the County Court afterwards granted the ferry to another. In a suit brought to recover the amount of the note—Held—That A. could show the failure of consideration, which arose from being deprived of the ferry.—*Evans vs. Murphy, et. al.* 226

**CORPORATION.**

1. Where the Mayor and Aldermen of a corporation, appropriated a certain amount to the holders of real estate, as damages, for injury done to such estate, in widening a street, held, First, That the consent of the holders of the real estate to receive the amount appropriated, vested sufficient consideration, to support an action for the recovery of the amount. Second, That the resolution of the corporation was an admission of the right of the parties in the land appropriated.—*Mayor and Ald. Mobile vs. Richardson, et al.* 12

**COSTS.**

1. In cases where a party undertakes the prosecution of a penal action, and sues in the name of himself, and of the state; it is competent for the Court to render judgment for all costs, against the informer, if he fails to maintain the action.—*Casey vs. Briant.* 51

**CREEK INDIANS**--See "Indian Lands"--1, 2, 3.

**DAMAGES**--Vide Title "Sheriff."--6.

**DEED.**

1. Where a party, to whom a deed has been executed, resides without the state, such circumstance will be sufficient, under the statute, to authorise a copy of the deed duly authenticated, to be received in evidence.—*Scott vs. Rivers.* 19
2. To render a deed valid and operative, there must be a delivery of it, either to the donee, or to some one for his use; or into the proper recording office.—*Frisbie, et ux. vs. McCarty.* 56
3. It is a rule, applying to conveyances, both of real and personal property, that where a legal and equitable title are united, the latter is merged in the former.—*Standefer vs. Chisholm.* 449
4. So, a *cestui que trust*, for whose security a trust deed has been executed, may take an absolute *bona fide* conveyance of the trust estate, and the latter becomes merged in the former.—*Id.* 449

**DEED OF TRUST.**

1. A deed of trust of personal estate, regularly executed and recorded, for the benefit of a creditor, will not be deemed invalid, merely for the want of the signature of the Trustee.—*Devoody vs. Hubbard.* 9
2. A *cestui que trust*, for, whose security a trust deed has been executed, may take an absolute *bona fide* conveyance of the trust estate, and the latter becomes merged in the former.—*Standefer v. Chisholm.* 449
3. A. having taken writs of error on sundry suits against him, B, C, D and E, became his sureties in the Bond. A. then executed a deed of trust to B, C and D, of certain slaves, conditioned for "the payment of the judgments, in the event of their affirmance." Held, that such deed was not made alone for the indemnity of the three sureties named in it, so as to authorise them to appropriate the entire amount of property included therein to their separate liabilities, but that it went generally to the payment of the judgments. *Bell v. Lamkin.* 400

**DISCONTINUANCE.**

1. Where a party has been recognised to appear at a particular term to answer for a breach of the peace, and the State takes no steps towards a forfeiture of the recognizance, (no indictment or presentment being preferred, or continuance had,) such failure operates as a discontinuance, and discharges the accused.—*Goodwin v. The Governor.*

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**ERROR, AND WRIT OF**

1. On overruling a motion, to enter up a judgment, *nunc pro tunc*, whereby costs are rendered against a party, a writ of error will lie.—*Wilkerson v. Goldthwaite.*
2. On the determination of a motion quashing an execution, a writ of error will lie.—*Tombeckbee Bank v. Strong's ex'rs.*
3. A judgment by default, before filing a declaration, is error.—*Masterton v. Beasley.*
4. In order to bring a cause into the appellate Court by error, all the parties must join in the writ—and it is competent for one to use the name of his co-defendant; without his consent.—*Jameson v. Collburn.*

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**EVIDENCE.**

1. The nominal plaintiff in a suit, (brought in the name of such plaintiff for the use of another,) can not be rejected as a witness for the defendant, where it appears that he was evidently consenting to be made a witness.—*Prewett, use, &c. v. Marsh.*
2. Where a party, to whom a deed has been executed, resides without the state, such circumstance will be sufficient, under the statute, to authorise a copy of the deed, duly authenticated, to be received in evidence.—*Scott v. Rivers.*
3. The certificate of a Judge to the exemplification of the record of another state, "that the attestation of the Clerk of the Court, is in proper form," is sufficient to authorise the admission of such exemplification in evidence.—*Brown v. Adair.*
4. The act of Congress of 1790, does not require the presiding Judge or Justice, to certify that the clerk, is clerk, at the time he attests the exemplification.—*Ib.*
5. The exemplification of a record, certified by the clerk of the court, under his private seal, there being no official seal, will be good and receivable in evidence as though a seal of office were annexed.—*Torbert v. Wilson.*
6. Under an indictment charging an assault on the 10th, evidence is admissible of assaults on the 3d and 4th of the same month.—*Shelton v. The State.*
7. The declarations of a party can not be given in evidence at his own instance, unless they form a part of the *res geste*.—*Kennedy v. Meador.*
8. It appearing, that improper testimony is admitted by a Court to go to a jury, the appellate Court will not presume the proof of circumstances, (not appearing in the bill of exceptions) which would render such testimony legal.—*Smith v. Maxwell.*
9. Where one in a suit at law, offers in evidence, as a whole, the record and proceedings of a chancery cause, between the same parties to the suit,—consisting in part of his own answer, and the depositions of witnesses, such record is not admissible as testimony.—*Moore v. Leftwich.*
10. Whether the statute book of a sister state, published under the proper authorities can be read in evidence in the Courts of this State—*Quare.—Herbert & Kyle v. Nashville Bank.*
11. But if the only testimony of an authority for the publication of such statute book, is the declarations of witnesses, *ore tenus*, the book is inadmissible.—*Ib.*
12. An answer in chancery, responding to the allegations of a bill, and expressly denying them, will prevail, unless the bill be sustained by the testimony of two witnesses—or of one witness, and strong concurring circumstances.—*Smith, et al. v. Rogers & Sons.*
13. Where the interest of a defendant in execution is perfectly balanced between the claimant and plaintiff, he is a competent witness for either party, and must be produced; and evidence of his declarations, is not admissible.—*Standesfer v. Chisholm.*
11. The gratuitous declarations of an agent, as to the ownership of property entrusted to his charge, are not evidence: if competent, he must be produced in person.—*Ib.*

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**EXCEPTIONS.**

1. If an exception is taken to the *refusal* of a Court to instruct the jury, the bill of exceptions must embrace so much of the evidence as to show that the instructions asked for, are out of the cause; but if the instructions actually given by the Court are excepted to, as mistaking the law, then no part of the testimony need be stated.—*Redd vs. Moore.*

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**EXECUTION.**

1. Motions in Court to credit an execution, or enter satisfaction on judgments; must be preceded by notice to the opposite party.—*Baylor vs. McGlagger & Darling.*
2. On the determination of a motion quashing an execution, a writ of error will lie.—*Tombell vs. Bart's vs. Strong's ex'rs.*
3. Where the interest of a defendant in execution is perfectly balanced between the claimant and plaintiff, he is a competent witness for either party, and must be produced; and evidence of his declarations, is not admissible.—*Standefer vs. Chickola.*
4. In a proceeding against a sheriff and his sureties, for failure to pay over money collected on an execution, it is necessary to prove who the sureties are.—*Barton, et al vs. The Bank, &c.*
5. In a trial of the right of property between a claimant and a plaintiff in execution, it does not devolve upon the latter to produce the judgment on which the execution issued—and the production of the execution is sufficient between the parties contending.—*Carlton, et al. vs. King.*

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**FRAUD.**

1. An issue in fact, involving a question of fraud, is proper to be determined by a jury; but where an issue in law arises, as where the validity of a deed or contract is drawn in question, it is the province of the Court to pronounce a decision, if fraud is apparent on the face of the deed or contract, or follows from the facts of the case presented.—*Richards vs. Hazard.*
2. Though a debtor in failing circumstances may by an assignment of his estate in trust, and in good faith, prefer one creditor to another; yet if such assignment be made without the consent of his creditors, and reserves to the debtor a portion of his property for the support of himself; and be otherwise arbitrary and unjust to the creditors generally; it will be declared fraudulent in the whole, and the favored creditor will not be allowed to avail himself of any benefit under the assignment.—*Id.*
3. An assignment made by an insolvent debtor of his estate, appropriating to himself, without the approbation of his creditors, a certain amount for his own support, is fraudulent and void.—*Id.*
4. A bill of sale of personal property, with condition of defeasance or mortgage, founded on a valuable consideration, and bona fide, is not fraudulent, *per se*, under our statute of frauds, as to creditors not having actual notice of its existence, where the possession remains with the grantor, for more than twelve months from its date.—*Killough vs. Steele.*

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**FREEHOLDER.**

1. Where an action is brought against a defendant in one county, while he is a resident freeholder of another, he must take advantage of such matter of defence in the action—and if the case proceeds to judgment, he will be foreclosed as to any future defence on that ground.—*Torbert vs. Bilson.*

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**GARNISHEE.**

1. Where a garnishee is summoned pursuant to law, to appear and answer as to his indebtedness to another, and it appears from the authority indorsed on the process that the summons was served by a deputy specially authorized by the sheriff to make that service; the counsel for the debtor—not being counsel for the garnishee—cannot have the summons dismissed, on the ground that the authority to the deputy to serve it was in fact given not by the sheriff, but by a deputy; this not appearing on the face of the papers—and the garnishee not having appeared or pleaded.—*Walker vs. Taylor.*

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**GIFT.**

1. It is essential to the validity of a parol gift, of personal property, that possession should accompany the gift.—*Frisbie, et ux, v. McCarty.*

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**HUNTSVILLE BANK.**

1. The Act of 1823 declaring a forfeiture of the charter of the Huntsville Bank to ensue from a failure to pay specie for its notes, did not take from the Bank the right to sue in its corporate capacity—*Huntsville Bank v. McGhee's ex.*

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**INDIAN LANDS.**

1. The State of Alabama has the undoubted constitutional right to extend its civil and criminal jurisdiction over any tract of Indian country within her limits, where the Indian title is not extinguished.—*Caldwell v. The State.*
2. The statute of 1823, extending the jurisdiction of the State of Alabama over the Creek nation, was not in violation of the Constitution of this State, or of the United States; nor of any act of Congress passed in compliance with the latter; or of any treaty made in pursuance thereof.—*Id.*
3. An offence committed in the Indian territory, to which the Indian title has not been extinguished, but over which territory the jurisdiction of the State Courts has been extended, is properly cognizable in the Courts of this State, and the conviction of one for felony on such lands, held legal.—*Id.*

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**INDICTMENT.**

1. Under an indictment charging an assault on the 10th, evidence is admissible of assaults on the 3d and 4th of the same month.—*Shelton v. The State.*
2. The time of committing an offence, (except where the time enters into the nature of that offence,) may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted.—*Id.*

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**INTEREST.**

1. The rate of interest, stipulated to be paid on a contract, in the absence of written or statutory law, may be fixed by a jury, according to the custom of the place where the contract is made.—*Tule v. Innerarity.*

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**JUDGMENT.**

1. Courts of law, in the exercise of legitimate and incidental powers, have authority to authorize the set-off, of one judgment, against another, existing between the same parties, in the same Court.—*Scott v. Rivers*
2. Motions in Court to credit an execution, or enter satisfaction on judgments; must be preceded by notice to the opposite party.—*Baylor vs. McGregor & Darling.*
3. If in entering a judgment, the clerk omits to insert the amount recovered, the judgment may be afterwards amended, and the amount inserted *nunc pro tunc*.—*Wilkinson v. Goldthwaite.*
4. On overruling a motion, to enter such judgment, whereby costs are rendered against a party, a writ of error will lie.—*Id.*
5. Where the Clerk, in entering a judgment, makes the entry in short, referring to another judgment, the entry of which is full, and in proper form, such judgment will not be deemed perfect, so as to authorize issuance of execution thereon.—*Tombeckbee Bank vs. Strong's ex'rs.*
6. Each judgment entered during a term must be of itself, full and in proper form, and the imperfections of one cannot be corrected by reference to another.—*Id.*
7. In a trial of the right of property between a claimant and a plaintiff in execution, it does not devolve upon the latter to produce the judgment on which the execution issued—and the production of the execution is sufficient between the parties contesting.—*Carlton, et al. vs. King.*

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**JURISDICTION OF THE STATE.**—See "Indian Lands"—1, 2, 3.

**JURY.**

1. Although in cases under twenty dollars, the courts are privileged to decide,

without a jury, yet a cause will not be reversed, merely because the Court (without objection from the parties) left it to be determined by a jury.—*Cassey v. Briant*.

2. Held, not error, that a counsel, with the assent of the Court, had a jury recalled, and an erroneous charge of such Court, in favor of such counsel, retracted.—*Smith v. Maxwell*.

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## JUSTICE OF THE PEACE.

1. A justice of the Peace who receives money in his official capacity, can not lawfully retain it, in satisfaction of a debt due him individually.—*Prewett, use, &c. v. Marsh*.

17

## LIENS.

1. The purchaser of real estate, has the right to discharge liens, and remove disabilities upon such estate, in order to obtain and perfect a title to himself.—*Smith v. Pettus, et al.*

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## LIMITATIONS, STATUTE OF

1. The statute of limitation, generally, does not operate on a contract, until the party is within the jurisdiction of the State, where sued.—*Towns, ex'r. vs. Bardwell, adm'r.*
2. A replication to a plea of the statute of limitations, that the maker of a note, at the time of its execution, resided in the State of North-Carolina; and had not resided in Alabama, six years before the issuance of the writ, held good, on demurrer.—*ib.*
3. *Semble*—It would not be so, if the statute had perfected a bar before the parties removed from the jurisdiction where the contract was entered into.—*ib.*
4. In a replication to a plea of the statute of limitation, of a former suit, the plaintiff must set out the particulars of such suit, so as to apprise the defendant of what he will have to answer.—*Torbert v. Wilson*.
5. It is no answer to the plea of the statute of limitation, that an action had been commenced in another county against the defendant, which action has not been disposed of: and in order to render such fact available against the plea of the statute, it must appear that the former action had been disposed of, before the last action was instituted.—*ib.*

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## MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, the felony charged in the affidavit must be substantially averred in the declaration; but it is not essential to recite the whole affidavit.—*Hughes v. Ross*.

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## MONEY COLLECTED, OFFICIALLY.

1. A justice of the peace, who receives money in his official capacity, can not lawfully retain it, in satisfaction of a debt due him individually.—*Prewett, use, vs. Marsh*.

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*Vide also, title "SHERIFF."*

## MORTGAGE—*Vide "Fraud"—4.*

## NOTES—*Vide "Bills of Exchange and Promissory Notes."—.*

## PENAL ACTIONS.

1. In cases where a party undertakes the prosecution of a penal action, and sues in the name of himself, and of the state; it is competent for the Court to render judgment for all costs, against the informer, if he fails to maintain the action.—*Cassey vs. Briant*.

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## PLEADING.

1. A replication to a plea of the statute of limitations, that the maker of a note, at the time of its execution, resided in the State of North-Carolina; and had not resided in Alabama, six years before the issuance of the writ, held good, on demurrer.—*Towns, ex'r, vs. Bardwell, adm'r.*

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**PLEADING.**

2. *Seemle*—It would not be so, if the statute had perfected a bar before the parties removed from the jurisdiction where the contract was entered into.—*Towns ex'r vs. Bardwell, adm'r.* 36
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5. Where a defendant produces an assigned note of the plaintiff, as a set off against the plaintiff's action, the latter may show a total or partial failure of the consideration for which the note was given, either by replication to the plea of set-off, or in answer to the general issue, and notice of set-off.—*Hutson vs. Tindall, ex'r.* 237
6. In an action on a paper, payable for staves, &c. it is essential to aver in the declaration, the number of staves actually procured.—*Martin & Hill v. Woodall.* 244
7. A judgment by default, before filing a declaration, is error.—*Mustertown v. Beasley.* 247
8. Under an averment in a declaration, "that the instrument was duly presented to the maker thereof," the plaintiff may shew in evidence, that the party was diligently sought and could not be found; and it is not essential to aver the latter facts specially.—*Taylor v. Branch.* 249
9. In an action for malicious prosecution, the felony charged in the affidavit must be substantially averred in the declaration; but it is not essential to recite the whole affidavit.—*Hughes v. Ross.* 256
10. Where a party, after being overruled on a demurrer, pleads over, he can not, if the declaration sets forth a cause of action, afterwards allege error in the judgment on such demurrer.—*Herbert & Kyle v. Nashville Bank.* 266
11. In an action on a note, payable to a party *eo nomine*, the capacity of the latter to contract and sue is *prima facie* admitted under the plea of the general issue.—*Herbert & Kyle vs. Nashville Bank.* 266

**PRACTICE.**

1. Courts of law, in the exercise of legitimate and incidental powers, have authority to authorise the set-off, of one judgment against another, existing between the same parties, in the same court.—*Scott v. Rixers.* 24
2. And such order is not subject to revision in error.—*Ib.* 24
3. Motions in Court to credit an execution, or enter satisfaction on judgments, must be preceded by notice to the opposite party.—*Baylor v. McGregor & Darling.* 158
4. If in entering a judgment, the clerk omits to insert the amount recovered, the judgment may be afterwards amended, and the amount inserted *non pro tanto*.—*Wilkinson v. Goldthwaite.* 159
5. On overruling a motion to enter such judgment, whereby costs are rendered against a party a writ of error will lie.—*Id.* 159
6. It is in the power of a party applying for the charge of a Court, to have it specifically applied to every point arising on the evidence; and where the charge is asked in such general manner, as that when given it may not be as explicit as the testimony would authorise: it is not a ground of reversal, that the charge was too general.—*Hunt & Norris vs. Toulmin.* 178
7. Where the clerk in entering a judgment, makes the entry in short, referring to another judgment, the entry of which is full and in proper form, such judgment will not be deemed perfect, so as to authorise issuance of execution thereon.—*Tombeckee Bank v. Strong's ex'rs.* 187
8. On the determination of a motion quashing an execution, a writ of error will lie.—*Id.* 157
9. *Scire Facias* to the representatives of an estate, to make them parties to a suit must be directed to them, as such.—*Heirs of Caller vs. Malone, et al.* 305
10. The Supreme Court will not entertain an *ex parte* motion to make individuals parties to a suit, on the return of a general *scire facias* only served on them, without evidence of their representative character.—*Ib.* 305

**PUBLIC LANDS.**

1. A mere verbal promise to pay a squatter for his improvements on public land, not made at the request of the promisor, will not sustain an action.—*Shaw vs. Boyd*. 83

**REAL ESTATE—Vide "Vendor and Vendee."****RECOGNIZANCE.**

1. A recognizance to appear at a term of the Court, and answer for an alleged offence; must set out specifically the kind of offence charged to have been committed.—*Goodwin v. The Governor*. 465
2. Where a party has been recognised to appear at a particular term to answer for a breach of the peace, and the State takes no steps towards a forfeiture of the recognizance, (no indictment or presentment being preferred, or continuance had,) such failure operates as a discontinuance, and discharges the accused.—*Goodwin v. The Governor*. 465

**RECORD.**

1. The certificate of a Judge to the exemplification of the record of another state, "that the attestation of the Clerk of the Court, is in proper form," is sufficient to authorise the admission of such exemplification in evidence.—*Brown v. Adair*. 49
2. The act of Congress of 1790, does not require the presiding Judge or Justice, to certify that the clerk, is clerk, at the time he attests the exemplification.—*Id*. 49
3. The exemplification of a record, certified by the clerk of the court, under his private seal, there being no official seal, will be good and receivable in evidence as though a seal of office were annexed.—*Tarbert v. Wilson*. 300

**RENT.**

1. An action of Assumpsit for rent, will not lie at Common Law, except on an express promise, made at the time of the demise.—*Bell vs. Ellis' Heirs*. 294
2. The act of 1812, in relation to the action of Assumpsit for rent, applies only to the case of a demise, and where there exists an agreement creating the relation of landlord and tenant.—*Id*. 294
3. So, where A has the possession of land, under an agreement of sale from B, who had no legal title to dispose of it; this action cannot be maintained by the owners of the land to recover of A, rent for its use and occupation.—*Id*. 294

**SCIRE FACIAS.**

1. *Scire facias* to the representatives of an estate, to make them parties to a suit, must be directed to them as such.—*Heirs of Caller v. Malone, et al*. 305
2. The Supreme Court will not entertain an *ex parte* motion to make individuals parties to a suit, on the return of a general *scire facias*, only served on them, without evidence of their representative character.—*Id*. 305

**SET-OFF.**

1. An off-set, against a plaintiffs' demand, in an action by him, to be available, and to authorise a balance in favor of the defendant, must appear to be of matters mutually subsisting between the parties.—*Scott v. Rivers*. 19
2. Courts of law, in the exercise of legitimate and incidental powers, have authority to authorise the set-off, of one judgment, against another, existing between the same parties in the same Court.—*Scott v. Rivers*. 24
3. And such order is not subject to revision in error.—*Id*. 24
4. Where an endorsed note is relied on as a set off, such endorsement must be proved. *Cass vs. Northrop*. 89
5. The statute of 1819, exempting plaintiffs, in suits on assigned paper, from proof of the assignment, unless defendant makes affidavit that it is forged; is not applicable to cases, where an endorsed paper is produced as a set off.—*Id*. 89
6. Where a defendant produces an assigned note of the plaintiff, as a set-off against the plaintiff's action, the latter may show a total or partial failure of the consideration for which the note was given, either by a replication to

the plea of set-off, or in answer to the general issue, and notice of set-off.—*Hudson v. Tindall, ex'r.*

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**SHERIFF.**

1. It is not competent for a court of law, on motion, to order the sheriff to retain out of money collected for a plaintiff, the charges of an attorney for commission, or compensation for extra services—not being costs or taxed fees.—*Long v. Lewis.* 229
2. In a proceeding against a sheriff and his sureties, for failure to pay over money collected on an execution, it is necessary to prove who the sureties are.—*Barton, et al. vs. The Bank, &c.* 471
3. In a proceeding against a sheriff and his sureties, under the act of 1825, for failing to pay over money, it is requisite to allege in the notice, by special averment, that the money had been demanded, and by whom that demand was made.—*Barton, et al. v. Peckis.* 486
4. But a verdict will cure the defect, if the record shows proof of the fact.—*Ib.* 486
5. Such proceedings are not limited to the period during which a sheriff holds his office, but may be instituted after that period has elapsed.—*Ib.* 486
6. Damages at the rate of five per cent. per month, in such cases, are allowed, from the time the demand is proved to have been made, until its collection.—*Ib.* 486

**TRUST.**

1. Where A paid to B a sum of money, to be vested in personal property for the use of B's child, and B instead of purchasing property, set apart a portion of his own, with the consent and approbation of A; B considered as the trustee of his child, and the possession deemed good, so as to vest in the child a title against either A or B's subsequent acts.—*Hardwick v. Robinson, et ux.* 99

**VENDOR AND VENDEE.**

1. It is competent for Courts of Chancery to relieve a purchaser of real estate from payment of the purchase money, where the vendor cannot effect a title.—*Smith vs. Pettus, et al.* 107
2. The inability of a vendor, through insolvency, to make titles to real estate sold by him, is a sufficient ground for the interposition of equity to prevent such vendor from enforcing the payment of the purchase money, until such disability is removed.—*Id.* 107
3. And where a note has been given by the vendee for the purchase money, equity will interpose against its recovery, even in the hands of an assignee if the equitable defence would have availed against the payee.—*Id.* 107
4. The purchaser of real estate, has the right to discharge liens, and remove disabilities upon such estate, in order to obtain and perfect a title to himself.—*ib.* 107
5. The vendee of personal property will not be permitted to defend against the consideration of the purchase money, by a mere allegation, that he has been deprived of the property by another, whose title is not shewn to have been superior to his own—and which title he would not defend, because the vendor's agent refused to execute a bond of indemnity.—*Cargill v. Walker* 223

**WILL.**

1. A will of personal estate, is not necessarily void, for want of subscribing witnesses.—*McGreaves v. McGreaves.* 30
2. The Orphans' Court has peculiar and original jurisdiction over the subject of the probate of wills, and its decree in relation to the establishment of a will must be taken as properly entered, upon legal testimony, unless the contrary appears.—*ib.* 30
3. A, by his last will and testament, bequeathed two quarter sections of land to his daughter B. The land had been purchased of the United States, and but one-third of the purchase money paid. Held, that A's executor was bound to pay out the balance due to the United States, and perfect B's title; on it appearing that her share, then, would only equal the legacies given off by the said will to A's other children.—*Green, et ux Moore, ex'r.* 212





